

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANTS

IN THE
**United States Court of Appeals
for the District of Columbia**

October Term, 1941

No. 8154

FREDERICK F. HUNDLEY and MARY G. HUNDLEY
Appellants

v.

REBECCA GOREWITZ, PAUL W. BOGIKES and MARION O.
BOGIKES,
Appellees.

Appeal from the United States District Court of the
District of Columbia.

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Frederick F. Hundley and Mary G. Hundley, his wife, Negro citizens of the United States, appeal from a judgment against them in favor of plaintiffs below (appellees here) entered December 1, 1941, by the United States District Court for the District of Columbia, after trial without a jury, ordering cancellation of a deed to the Hundleys and restraining their occupation of Lot 77 (821) in Square 2866, premises 2530 13th Street, Northwest, in the District of

Columbia on the ground of violation by the Hundleys of a perpetual restrictive covenant prohibiting the sale or transfer of said lot to a Negro. (Appellants' App.* 19).

The District Court had jurisdiction under D. C. Code 1940, title 11, section 301.

This Court has jurisdiction to review the judgment under D. C. Code 1940, title 11, Section 101, and United States Code title 28, section 225.

The pleadings which show the existence of jurisdiction are the complaint and answer (App. 1).

STATEMENT OF THE CASE

Appellants Hundleys are Negroes, appellees Gorewitz and Bogikes white (App. 13). Appellants January 17, 1941, purchased Lot 77 (821) in Square 2866, improved by a two story brick residence known as 2530 13th Street, Northwest, from a white seller, defendant below Nelson D. Holmes, and ever since have occupied the premises as their home (App. 2, 68). The deed to the Hundleys recited it was "subject to the covenants of record", to wit:

"Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars (\$2,000.00) which shall be a lien against said property." (App. 14).

This covenant also appeared in the chain of title to appellee Gorewitz's Lot 78 (822) premises 2528 13th Street and appellees Bogikes' Lot 75, premises 2534 13th Street. (App. 14).

The history of the covenant is that in 1910 Harry B. Willson and Harry Wardman built six houses on six contiguous lots in Square 2866, fronting on the west side of 13th Street, Northwest, in the middle of the 2500 block

* Hereafter "App." means Appellants' Appendix.

between Clifton and Euclid Streets, Northwest. The six lots and houses were

Lot 80 (824), premises 2524 13th Street

Lot 79 (823), premises 2526 13th Street (Preston: Fleet)

Lot 78 (822), premises 2528 13th Street (Gorewitz)

Lot 77 (821), premises 2530 13th Street (Hundley)

Lot 76 (820), premises 2532 13th Street

Lot 75, premises 2534 13th Street (Bogikes)

(See photograph, Typewritten Transcript, p. 12)

The builders sold and conveyed five of the lots (Nos. 80, 78, 77, 76 and 75) under deeds containing the restrictive covenant noted. They sold *Lot 79* (the present *Fleet house*) *without* the restrictive covenant. (App. 14).

There are six other houses on the west side of 13th Street in the same block; and four single houses and three large apartments on the east side of the street (Square 2865) in the same block. (Typewritten Transcript, p. 16). None of these properties on either the west side or the east side is burdened with the restrictive covenant. (App. 54, et seq.).

In 1928 an attempt was made to have all the owners in the block on both sides of the street enter into a 50 year restrictive agreement against ownership or occupation of any property in the block by Negroes. The agreement contained a proviso

“that if this indenture be not executed by the owners of all the property above described (*on both sides of the street*) and if any of the property, the present owner or owners of which do not execute this indenture, be hereafter, by the owner or owners thereof, sold, conveyed, leased, rented, given to or allowed to be used or occupied by a Negro or Negroes . . . the undersigned and their several successors in ownership and their several properties now owned by them shall not thereafter be bound by this indenture.” (Italics and matter in parentheses, ours.)

All the property owners did not execute the agreement. On the west side of the street the owners of Lot 65 (premises 2520) and Lot 77 (otherwise Lot 821, premises 2530, the Hundleys' house) did not sign. On the east side of the street in Square 2865 the owners of Lot 167 (premises 2505), Lot 168 (premises 2515) and Lot 831 (premises 2523, the Savoy house) did not sign. (Typewritten Transcript, p. 22.)

In 1934 the Home Owners Loan Corporation made a loan secured on Lot 77, Square 2866 (the Hundley house), by deed in trust. Upon default in payment of the loan the property was foreclosed and sold at public auction November 12, 1940; bought in by the Home Owners Loan Corporation and duly conveyed to it November 13, 1940, by the trustees. December 23, 1940, the Home Owners Loan Corporation sold and conveyed the property to the defendant below Nelson D. Holmes. The deed in trust securing the Home Owners Loan Corporation, the trustees deed to the Home Owners Loan Corporation, and the Corporation deed to Holmes contained no reference to the covenant. But when Holmes conveyed to the Hundleys, he conveyed "subject to the covenants of record." (App. 72, et seq.)

On or about June 7, 1940, the owner of Lot 79, Square 2866 (the Fleet house) sold and conveyed to one Preston who immediately put the Fleet family, a Negro family, in possession, and conveyed the property March 7, 1941, to Ernest Leroy Fleet. (Typewritten Transcript, p. —). On January 17, 1941, as noted above Holmes sold and conveyed Lot 77 to the Hundleys who immediately took possession. (App. 73).

Plaintiffs below Gorewitz and Bogikes and others March 13, 1941, brought suit against Preston and the Fleets in Civil Action No. 10,551 to cancel the deed to Ernest Leroy Fleet and restrain them from occupying Lot 79 as a violation of the 1928 restrictive agreement. (Typewritten Transcript, pp. 25, 17 et seq.) On April 7, 1941, Gorewitz and Bogikes brought suit against Holmes and the Hundleys to cancel the deed to the Hundleys and restrain them from occupying

Lot 77 as a violation of the *1910 restrictive deed covenant*. (Typewritten Transcript, p.—).

On final hearing the suit against the Fleets was dismissed July 23, 1941. No appeal was taken. (Typewritten Transcript, pp. 24-25).

At the hearing of the instant case it developed from the testimony adduced by plaintiffs below that they did not purchase their respective properties relying on the *1910 covenant*, and did not know of the *1910 covenant* until they were told about the same by Sparrel Wood after both the Fleets and the Hundleys were in possession (App. 62); that the presence of the Hundleys did not depreciate the value of the plaintiffs' properties or the neighborhood (App. 43); that the Home Owners Loan Corporation sold Lot 75 to the Bogikes for \$8,000.00 when the Corporations' asking price was \$9,500.00 (App. 78) and when it had an offer from a Negro bishop of \$10,000.00 but did not accept same because of the covenant against the property (App. 39, 78); that the Hundleys are respectable people. (App. 33, 42). The trial court found that the Hundleys had spent about \$2,300.00 in improving their premises. (App. 15). The basic objection to the Hundleys was their race. (App. 33, 43).

Plaintiffs below testified that they would not have purchased their properties if they had known Lot 79 (the Fleet house) was not covenanted. (App. 32, 41). The court excluded a question to plaintiff Bogikes whether she would remain in the neighborhood if the Fleets stayed. (App. 42).

The defendants conceded that they purchased with notice of the covenant, relying on the opinion of a real estate agent that the covenant was invalid. (App. 74). They further proffered evidence to show the cycle of real estate neighborhood development, that this neighborhood was passing from a home owners neighborhood to a tenancy neighborhood, that the property was on a main thoroughfare, and real estate use along a main thoroughfare changed rapidly, and social and economic laws pointed out the inevitability

of this property and neighborhood going colored, covenant or no covenant, so that to issue the injunction would be futile and would not perpetuate the neighborhood as white. (App. 65, 66, 83, 84). The court over defendants' objection rejected the evidence. (App. 65, 66, 83, 84).

Defendants then offered evidence showing the rapid growth of Negro ownership and occupation in the area within the past fifteen years, and offered to show that in other neighborhoods where injunctions against Negro ownership and occupation had issued, the injunctions had not served to prevent the neighborhood from changing from white to colored. (App. 84). This evidence the court rejected. (App. 84).

Defendants tendered evidence on the futility of the covenant and the proposed injunction as defeating its own ends by showing that Preston who purchased the Fleet house was a Negro who was mistaken for white (App. 69); that plaintiff Gorewitz could not tell white from colored, or vice versa (App. 69, 72); that many Negroes were forced to pass for white and did so because of the restrictions on them as Negroes (App. 69, 71). This evidence the court rejected. (App. 69, 71).

Lauren Fleet testified that regardless what happened his family intended to remain in possession of their house (Lot 79). (App. 79).

Subsequent to the hearing of this case but before judgment was entered, premises 2523 13th Street (Lot 831 in Square 2865) November 19, 1941, was sold to a Negro, Gertrude Savoy. Appellants attempted to make this a part of the record illustrating the operation of the economic and social laws operating on the neighborhood by motion for leave to supplement their answer. (App. 11; Typewritten Transcript, p. 115). The court denied the motion. (App. 13).

On December 1, 1941, the court entered its judgment cancelling the deed to the Hundleys and ordering them to remove from the premises by April 1, 1942; whereupon appel-

lants duly noted and prosecuted this appeal. (App. 19).

CONSTITUTION AND STATUTES INVOLVED

Appellants rely on, among other things, the due process clause of the Fifth Amendment and Section 1 of the Thirteenth Amendment to the United States Constitution; the United States Code, title 8, section 42; and title 12, sections 1461 and following. They are set out in the Appendix.

STATEMENT OF POINTS

1. The Court erred in holding that the covenant was enforceable against appellants.

2. The Court erred in ordering the appellants to remove from the premises inasmuch as the covenant does not prohibit occupation or possession of the premises by a Negro.

3. The Court erred in holding that the covenant was not extinguished when title to the property was acquired by the United States, acting through its instrumentality, the Home Owners Loan Corporation.

4. The covenant is an unlawful restraint on alienation.

5. The covenant is against the public policy of the United States and not enforceable in a Federal court.

6. The Court erred in excluding testimony as to the cycle of change in real estate use and occupation in the neighborhood.

7. The Court erred in excluding the question to plaintiff Bogikes whether she would remain in her property if the Fleets stayed in theirs.

8. The Court erred in excluding the evidence offered as to the racial identity of Preston, and the indistinguishability of many Negroes from whites and Negroes crossing the color line because of proscriptions against their race.

9. The Court erred in denying appellants' motion to supplement their answer.

10. Enforcement of the covenant by the Court constituted governmental action and deprived appellants of their property without due process of law in violation of the Fifth Amendment to the United States Constitution.

SUMMARY OF THE ARGUMENT

I. The Court erred in holding that the covenant was enforceable against appellants in favor of appellees as subsequent grantees, because

A. The record negatives the existence of any neighborhood scheme of development or comprehensive building plan which the covenant was designed to protect.

B. The covenant in this case constitutes an undue and unlawful restraint on alienation.

C. The covenant was extinguished when title vested in the United States, or its *alter ego*, the Home Owners Loan Corporation.

D. Recital of the covenant in the deed from Holmes to the Hundleys could not revive the covenant which had been extinguished by the previous conveyances without notice.

II. The Court erred in ordering appellants to remove from the property because the covenant does not prohibit the occupation and possession of the property by a Negro.

III. The Court erred, to the material prejudice of appellants, in

A. Excluding the evidence proffered as to the economic and social laws controlling the cycle of residential use of real estate.

B. Excluding the evidence whether appellee Bogikes would remain in her house *if* the Fleets remained.

C. Excluding the evidence regarding Negroes being able to and actually crossing the color line because of proscriptions on them because of race.

IV. Enforcement of the covenant by the court is governmental action, and constitutes a taking of appellants' property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

V. The injunction is futile because the object of the covenant can not be attained.

ARGUMENT

I

The Court erred in holding that the covenant was enforceable against appellants in favor of appellees as subsequent grantees, because

A

The record negatives the existence of any neighborhood scheme of development or comprehensive building plan which the covenant was designed to protect.

Where the covenant is not imposed in furtherance of a neighborhood scheme of development or comprehensive building plan, the subsequent grantees cannot enforce the covenant.

McNeil v. Gary, 40 App. D. C. 397 (1913).

Toothaker v. Pleasant, 288 S. W. 38 (Mo. Sup. Ct., 1926). Our argument here does not rest on change of neighborhood but on the proposition that the row of the six Willson & Wardman houses in the middle of the 2500 block of 13th Street between Clifton and Euclid Streets did not constitute a neighborhood nor a comprehensive building scheme. (Typewritten Transcript, pp. 12, 16; App. 26).

1. In said 2500 block of 13th Street the six Willson & Wardman houses are in the middle of the block on the west side of the street. On the same west side there is another row of houses between them and the corner of Clifton Street, and a large boarding house between them and the corner of Euclid Street; six other houses on the same side of the street, without this covenant or any other legally binding restrictive agreement against Negro ownership or occupancy in their chain of title. On the east side of the street there are four single houses and three large apartments, none of which has this covenant or any other legally binding restrictive agreement against Negro ownership or occupancy in its chain of title. There are 19 improved properties in the 2500 block of 13th Street, with the six Willson & Wardman houses constituting a minority. These six Willson & Wardman houses do not even constitute a segment of houses at one of the four corners; but are in the middle flanked on both sides and fronted across the street by property not subject to the covenant or any binding racial restriction. (Typewritten Transcript, p. 16).

What is a "neighborhood" within the meaning of the cases granting enforcement of these restrictive covenants? An entire circle development, *e.g.* Chevy Chase Circle in *Kenealy v. Chevy Chase Land Co.*, 63 App. D. C. 327, 72 F. 2d 378 (1934). One block, in *Meade v. Dennistone*, 173 Md. 295, 196 A. 330, 114 A. L. R. 1227 (1938); at least a block, in *Porter v. Johnson*, 115 S. W. 2d 528 (Mo. Supreme Court, 1938). Immediate vicinity, in *Grady v. Garland*, 67 App. D. C. 73, 89 F. 2d 817 (1937). Counsel has not been able to find any case in which a minority of six houses in the middle of a built up block of 19 properties has been held to constitute a neighborhood for purpose of enforcing a "restrictive neighborhood development" covenant.

Grady v. Garland, *supra*, is the smallest unit of houses which the local courts have dealt with in these restrictive covenant cases. There 8 houses on the corner of a block—6 on First Street and 2 contiguous houses around the cor-

ner of First and S Streets on S Street—were involved, but the decision of the court is predicated directly on the houses in the immediate vicinity. Further, *Grady v. Garland* can be distinguished on the ground that the plaintiff who asserted the invalidity of the covenant came in and asked affirmative relief: not only that the covenant be cancelled as against his property on First Street but also that it be cancelled as against the two defendants' properties *around the corner on S Street*. In the instant case appellants are not asking any affirmative relief but merely defending their ownership and occupancy against plaintiffs' attack.

2. The plaintiffs below (appellees) have given us their own construction of "neighborhood." Plaintiff Gorewitz testified that what she wanted to protect was not only the six Willson & Wardman properties but fundamentally the block (App. 35-36). Sparrel A. Wood, the prime mover and activating spirit in the case, testified for plaintiffs that he called block meetings; that what everyone was trying to do at the outset was to protect the "citizens agreement" which unsuccessfully attempted to blanket the block, and that no one (*not even plaintiff Gorewitz*) knew about the separate 1910 deed covenant on the Willson & Wardman houses until he himself had first been informed thereof by Patrick D. Holmes, verified the information at the title company, called a block meeting and then for the first time advised Mrs. Gorewitz and the others about the 1910 deed covenant on the Willson & Wardman houses. (App. 54 et seq.) It is obvious beyond possibility of dispute that plaintiffs did not consider these six Willson & Wardman houses in the middle of the block as a neighborhood.

3. The record negatives the existence of any *neighborhood scheme* in this case, regardless whether one adopts the block-unit or even a six-house-middle-of-the-block segment unit as the yardstick. On the block-unit standard the record discloses that in 1928 some of the then owners of

property in the block attempted to blanket all properties in the block with a restrictive 50-year agreement barring Negro ownership or occupancy of properties in the block. (Typewritten Transcript, p. 22). The owners of 5 properties out of 19 properties in the block refused to sign; and it has been judicially determined in another suit wherein the same appellees were plaintiffs that said restrictive agreement was not binding. (*Gorewitz v. Preston*, Civil Action No. 10551; Typewritten Transcript, pp. 23, 24).

On the six-house-segment standard the record discloses that Willson & Wardman sold house No. 2 in the row [Lot 79 (823), premises 2526 13th Street—the Fleet house] without any restrictive covenant in the deed. There are cases holding that where a person develops a tract of land and subdivides it into lots which he conveys subject to well defined restrictions, his failure to include the restrictions in the deeds to one or two lots will not shatter the general scheme.

Leader v. Leflamme, 111 Me. 242, 88 A. 859 (1913); same tract of land, *Caron v. Margolin*, 128 Me. 340, 147 A. 419 (1929).

But a critical examination of the facts of those cases will show there is no magic in the word “subdivision,” that the word “subdivision” is not a word of art. Critical examination will show that the tract in question was a large tract of land in which one or two lots constitute a negligible percentage and leave the great mass of the land unaffected by the deviation. The instant case presents a different situation. Here the deviation is one out of six, and not a house on the end of a row but house No. 2 in the middle of the row:

	1	2	3	4	5	6	
Clifton		2526 Fleet no cov.	Gorewitz 2528	Hundley 2530		Bogikes 2534	Fuelid
13th							

House No. 1 is isolated, so the only unbroken line of covenanted houses is four houses beginning with the Gorewitz house No. 3 and running thru the Bogikes house No. 6. That reduces the "neighborhood" to four houses. But Willson & Wardman did not build four houses; they built six. There is nothing in the record to show they were more concerned, placed a higher value on, or in any way held houses 3, 4, 5 and 6 different from houses 1 and 2. The practical deviation with houses 1 and 2 out of the restrictive "scheme" shows a deviation of 33.3 per cent.

It needs no argument to prove that the smaller the size of the subdivision the more significant any deviation becomes. A deviation of 33.3 per cent would cripple even so large a development as a city suburb. It is absolutely fatal in a subdivision of six lots in the middle of one city block. Certainly no one can reasonably hold that Willson & Wardman created a restricted neighborhood out of their subdivision of six lots in the middle of the 2500 block of 13th Street.

4. If the restrictive covenant be construed as the hope of the builders Willson & Wardman that some day the owners of the other properties in the block would get together and create a restricted neighborhood, the record shows the collapse and frustration of such hopes in 1928 when the owners

of five properties out of nineteen, more than 25 per cent of the properties, refused to sign the restrictive agreement. (Typewritten Transcript, pp. 16, 22.)

5. The record likewise negatives any theory of a comprehensive building plan. The record definitely shows the Willson & Wardman houses as a part of a long row of houses running the entire length of the square. (Typewritten Transcript, p. 12.) The houses in the block are not of the same type of construction. (Typewritten Transcript, p. 115.) The record is silent as to who built them; why or when; whether they were built in groups by real estate speculators or independently by individual owners. Merely stating that Willson & Wardman subdivided their ground and built a row of six dwelling houses in the middle of the block does not establish a comprehensive building scheme broad enough to support a racial restrictive covenant running with the land. Any time an owner subdivides a single lot he creates a new "subdivision." If he builds two houses in the middle of a square he has created a building scheme. If he conveys both these houses subject to a perpetual restrictive covenant against Negro ownership or occupation, is the court going to hold that those two houses constitute such a comprehensive building scheme that the covenant will run with the land against subsequent grantees potentially *ad infinitum*. If that is so, the value of the Negro's citizenship becomes very small indeed.

6. Where racial prejudice is not concerned, restrictive covenants burdening the title and use of real estate are not encouraged.

"Restrictions of this nature placed upon the use of real estate are to be strictly construed against the grantor, and liberally in favor of the grantee," per Van Orsdel, J., dissenting in *McNeil v. Gary*, *supra*, at p. 402, where a Negro was not involved.

The burden was on the plaintiffs below to establish that the covenant in this case ran with the land. Plaintiffs below offered no such evidence, but relied wholly on the fact that this court had held that a similar covenant imposed on property in *another* neighborhood in the District of Columbia ran with the land. (App. 22).

Torrey v. Wolfes et al, 56 App. D. C. 4, 6 F 2d 702 (1925). But the genius of our law is that the decision and opinion of the court must be read in the light of the facts before the court.

In the other cases involving a similar covenant the Court had before it much larger developments of property than the abbreviated undertaking of Willson & Wardman here. The picture in this case is of two real estate speculators in 1910 putting up six houses in the middle of a block, unrelated in plan or program to any buildings on the sides, front or rear; putting a restrictive covenant on five out of the six houses, with the unrestricted house in the middle of the development; then 30 years later after Negroes had bought and moved into the unrestricted house No. 2, the white owners, subsequent grantees, of houses No. 3 and 6 want to use the covenant to evict a Negro family which has bought and moved into house No. 4, where the entire block has no valid restriction against Negro ownership and occupancy, and in addition to the Negro family in house No. 2 another Negro has bought property directly across the street from the Willson & Wardman houses. (App. 11), Typewritten Transcript, pp. 12, 115.) It is respectfully submitted that this is carrying racial prejudice to the point of spite and petulance which this Honorable Court can not possibly uphold.

B

The covenant in this case constitutes an undue and unlawful restraint on alienation.

In this jurisdiction covenants imposing a perpetual re-

straint against Negro ownership and occupation have been upheld without a critical examination of the implications involved.

E.g. *Torrey v. Wolfes*, 56 App. D. C. 4, 6 F. 2d 702 (1925)
Cornish v. O'Donoghue, 58 App. D. C. 359, 30 F. 2d 983 (1929)

But the question can not be dismissed so lightly. The restriction is basically inconsistent with the nature of a fee simple title. The evils of the rule against perpetuities become slight by comparison. Politically and socially such perpetual covenants reflect a world gone with the wind, and rush into the realm of prophecy in which in view of the thunder of guns all over the world at this moment the wisest men fear to tread.

Real estate in this country is as much an article of sale and traffic as personal property, and the policy of government has always been to encourage both the acquisition and easy and free alienation of lands.

Mandlebaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61 (1874)

Even if we should admit for purposes of argument that a restraint on the fee for a limited duration is not illegal,

Contra, Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115 (1919)

Nevertheless a perpetual covenant is too long and the class excluded is too large for a perpetual restraint to be upheld.

Porter v. Barrett, 233 Mich. 373, 206 N. W. 532, 42 A. L. R. 1267 (1925)
White v. White, 108 W. Va. 128, 150 S. E. 531, 66 A. L. R. 518 (1929)

The history of real estate development in the District of Columbia in the past 50 years shows an ever increasing use of private restrictive covenants as devices to prevent Negroes from buying property anywhere outside of traditionally Negro settled areas in the District of Columbia. The Negro population according to census reports and common observation is constantly growing. Yet these perpetual covenants would take one historical moment and attempt to freeze the civic pattern of that moment world without end.

The result is overcrowding, with all the economic concomitants of higher rents for the old houses which whites have abandoned, higher sale prices, which with a low income group such as the Negro population means that Negroes have to pile more persons into a house to meet the rental or monthly payments. This in turn produces abnormal wear and tear and depreciation of property, the creation of slum and depressed areas.

“Similarly in Washington, D. C., there is a central nucleus of blocks almost entirely occupied by non-whites in the area that has its center at Seventh Street and Florida Avenue. This area is surrounded by a fringe of blocks in which non-white concentration is smaller. While there is thus a gradual transition in density of non-white population in the central part of Washington, the non-white areas come to an abrupt termination in the northwest quarter at Park Road and Monroe Street, and at Euclid Street between Sixteenth Street and Columbia Road. There are small detached colonies in Washington beyond this central nucleus in all directions. Outlying non-white colonies such as Anacostia in Washington, and at Ninety-fifth and State Streets in Chicago, are like satellites detached from the main mass.” From *The Structure and Growth of Residential Neighborhoods in American Cities*, p. 68 (study by the Federal Housing Administration, Govt. Ptg. Office, 1939).

“This gradation of rent reveals qualitative differences of housing as between white and non-white races.

The differences are borne out by the relative condition of structures in blocks occupied by white, mixed, and non-white persons. Thus, 12.2 per cent of the structures in the 85,478 blocks (of a 64-city survey) occupied exclusively by white persons were in need of major repairs in 1934 or were unfit for use. In the 10,288 mixed racial blocks, 38.6 per cent of the structures were in this poor condition, and in the 5,004 blocks occupied exclusively by non-white races, the proportion of such structures rose to 50.9 per cent.

"Such figures compel us to conclude that other than white racial groups in American cities dwell largely in sections marked by low-quality housing." (*Loc. cited*, p. 71.)

In the wake of overcrowding stalk crime, immorality, and disease. And the very prejudiced white people who make these perpetual restrictive covenants to keep Negro residences at arms-length pay the toll of the increased public cost of crime, immorality, disease and fear of violence. They pay in even a more direct way. They pen the Negroes up like cattle in ghettos at night, yet these same Negroes in the morning enter their homes as servants to perform all the intimate tasks of the household including the pre-school training of the covenantors' children.

The Constitution prohibits the public authorities from creating these racial ghettos;

Buchanan v. Warley, 245 U. S. 60, 62 L. ed. 149, 38 S. Ct. 16 (1917)

yet the courts give private citizens the power by subtracting ever increasing areas of land from the Negro market to do indirectly what the government can not do directly. It is not enough to engage in sophistries about "freedom of contract."

Corrigan v. Buckley, 55 App. D. C. 30, 299 F. 899 (1924)
affirmed 271 U. S. 323, 70 L. ed. 969, 46 S. C. 521 (1926)

Negroes are not asking the courts to compel white people to sell property to them against their will. What they are asking is that when a white person voluntarily makes up his mind to sell to a Negro, the sale should not be enjoined because some "dead hand" two generations previous not wishing Negroes as neighbors placed a perpetual restriction on the land binding all future generations. Perhaps perpetual covenants might not have been oppressive in frontier days when there was a surplus of unappropriated land; but frontier days in American cities have passed. All the land is appropriated and owned. Ownership of land must pass by substitution, not new acquisition. The white people have the bulk of the land. Will they intelligently try to make provision for the irresistible demands of an expanding population, or will they blindly permit private individuals whose social vision is no broader than their personal prejudices to constrict the natural expansion of residential area until we reach the point where the irresistible force meets the immovable body?

There is another factor which makes these perpetual racial restrictive covenants an unlawful restraint on alienation. Negroes constitute approximately 30 per cent of the population of the District of Columbia. These perpetual covenants reduce the medium real estate market by just 30 per cent.

Even white neighborhoods do not remain static. "There is a constant outward movement of neighborhoods because as neighborhoods become older they tend to be less desirable. Forces constantly and steadily at work are causing a deterioration in existing neighborhoods . . . Both the buildings and the people are always growing older. Physical depreciation of structures and the aging of families constantly are lessening the vital powers of the neighborhood. Children grow up and move away. Houses with increasing age are faced with higher repair bills. This steady process of deterioration is hastened by obsolescence; a new and more modern type of structures relegates these structures

to the second rank. . . . There is often a sudden decline in value due to a sharp transition in the character of the neighborhood or to a period of depression in the real estate cycle. These internal changes due to depreciation and obsolescence in themselves cause shifts in the locations of neighborhoods. . . . The erection of new dwellings on the periphery of a city, made accessible by new circulatory systems sets in motion forces tending to draw population from the older houses and to cause all groups to move up a step leaving the oldest and cheapest houses to be occupied by the poorest families or to be vacated. The constant competition of new areas is itself a cause of neighborhood shifts. Every building boom, with its new crop of structures equipped with the latest modern devices, pushes all existing structures a notch down in the scale of desirability." [F. H. A. study, *loc. cited*, pp. 121-122].

On whom does the economic loss in values fall? On the white owners or their descendants. It is a fallacy to speak of Negroes causing a change in the neighborhood. The Negroes never appear as a cause; their appearance is a result of previous changes in the neighborhood antedating their presence. Negroes cannot buy until white people are willing to sell. The white people do not sell until the old characteristics of the neighborhood are gone and they want to get out and away to a new neighborhood.

The proof that the covenants defeat themselves is the fact that the very people who make the covenants are the very people who break them.

"On the other hand, houses in intermediate rental neighborhoods designed for small families can be handed down to a slightly lower income group as they lose some of their original desirability because of age and obsolescence. There is a loss of value when a transition to a lower income group occurs, but the house is still used for the essential purpose for which it was designed; and the loss of value is not so great. There is always a class filtration to occupy the houses

in the intermediate rental neighborhoods. Hence, a certain stability of value is assured." (F. H. A. study, *loc. cited*, pp. 121-122).

The truth is that instead of depreciating a neighborhood, Negro home purchasers tend to peg the falling values or even increase them because the demand of Negroes for homes always exceeds the supply. Neighborhoods follow a definite cycle of development. They begin as white home residential areas; they pass to partial tenancy, then almost complete tenancy with resultant anonymity. At that point the old neighborhood is gone—prior to the first Negro purchase. Negro home owners come in and improve the old structures for their own family use. (App. 47). Values rise, even for the white owners who wish to remain.

In the present case appellants showed that the 2500 block of 13th Street had passed to the tenancy cycle so far as whites were concerned. (App.—). The Negroes then and not until then were able to begin buying homes. The best evidence as to the effect of Negro purchases in this neighborhood comes from the lips of a white real estate expert, introduced by plaintiffs below as their own witness: (Patrick D. Holmes, App. 46, 47, 48, 50, 53):

"Cross-Examination

"By Mr. Houston . . .

"Q. Now Mr. Holmes, you are familiar with the property that the Huntleys bought?

"A. Yes sir.

"Q. Have they depreciated or deteriorated the property by their occupation?

"A. I should say not." (App. 46) . . .

"Q. Mr. Holmes will you give your expert opinion as to the effect of the Huntleys taking over the occupation and use of the real estate, considering the repairs they have made, as to either its depreciation or increase in value?

"A. They have improved the property, at least to the extent of \$1,500.00 or \$2,000.00. It is improved to that

extent. I would not have obligated myself to do it for less than that.

"Q. In comparison with the other five houses in the same row, how would you say the Huntleys' house compares in appearance?

"A. I have not inspected the interior of each of those houses, but, I would say they have got the best house in the row." (App. 47-48).

"Re-direct Examination

"By Mr. Gilligan: . . .

"Q. Would you like to buy Mrs. Gorowitz' home so that you might live next door to the Huntleys?

"A. I would rather live next door to the Huntleys than Mrs. Gorowitz.

"Q. That is not my question. If she paid \$13,000.00 for her property, and wanted to sell for \$10,000.00, would you pay that and live next door to the Huntleys?

"A. No, I would not pay that for it now.

"Q. Does the moving in of colored people depreciate the value of price in the neighborhood?

"A. That depends on the neighborhood. In that neighborhood the colored people have paid \$1,000.00 to \$3,000.00 more." (App. 48).

"Recross-examination

"By Mr. Houston: . . .

"Q. Mrs. Gorowitz has testified that in 1927 she bought her property for \$13,500.00. Assuming there were no Negroes in the block at all, would her property be worth \$13,500.00 today?

"A. No sir, it would not be worth much more than \$6,500.00.

"Q. As a matter of fact generally in 1927 there was an era of great inflation in real estate values?

"A. Yes, sir.

"Q. So, in your opinion as a real estate operator, if Mrs. Gorowitz wanted to sell, and was not able to get \$13,500.00,

it would not be because Negroes were in the block, and that they have depreciated the value of the property?

“A. No sir.” (App. 50).

* * * * *

“Q. I will ask you further, in your opinion the fact of the Hundleys’ remaining in the block depreciates the value of the property in that block?

“A. I don’t think so.” (App. 53).

Photographs of exterior and interior views of the Hundley house show that they maintain their property according to high cultural standards (Typewritten Transcript, pp. —), and plaintiff Bogikes was forced to admit the same (App. 43).

There must be a market for these houses which the white people want to leave. There must be a point at which because of obsolescence and other internal and external changes in the neighborhood no white people with income sufficient to maintain the houses will be willing to take them. What is to happen to the houses at that point in face of the perpetual restrictive covenant against Negro ownership and occupancy? Here only two owners out of four covenanted houses are complaining about the Hundleys’ presence; and of these two plaintiff Bogikes says she will move even tho the Hundleys have to vacate under injunction if the Fleets remain in their house (App. 41). Will the court uphold a dog-in-the-manger attitude on the part of plaintiff Gorewitz, just because she bought her property for \$13,500.00 at boom prices and cannot get her price now, and evict the Hundleys from her north side while the Fleets remain immovable on her south side? (App. 79). Will the court destroy the ultimate residual market for these houses to satisfy one citizen’s prejudice?

It is a crime and a sour reflection on the moral standards of American life that Negroes have to buy obsolete houses at exorbitant prices, which white people are vacating, in order to have decent housing. That must be a comforting

thought for a Negro soldier to reflect upon while standing sentry duty in Australia or the Philippines. But we confine ourselves to the question of marketability. And the point there is that these perpetual covenants not only plague the Negroes but ultimately fasten themselves like millstones around the necks of the whites who make them. We repeat these perpetual covenants run too long and the class excluded is too large for them to be upheld. They are an anachronism; they are inconsistent with the structure and growth, and ever changing population of *our* American cities. They constitute an unlawful restraint on alienation, and the courts should strike a blow for national unity by emphatically declaring them null and void and a cloud on the title to the land.

See dissenting opinion of Stephens, J., in *Grady v. Garland*, *supra*.

C

The covenant was extinguished when title vested in the United States, or its alter ego, the Home Owners Loan Corporation.

The Home Owners Loan Corporation is a governmental agency of the United States partaking of all incidents of sovereignty not waived by Congress. It was created by the mere fiat of Congress, is under the exclusive control of the Federal government; all its officers and agents are government employees; the objects of its creation and operation are governmental functions; its funds are public funds; and criminal interference with its operations is an offense against the United States.

See Home Owners Loan Act of June 13, 1933, c. 64, 48 Stat. 128; U. S. Code, title 12, ch. 12. (App. 87 et seq.)

The Act itself denominates the H. O. L. C. as "an instrumentality of the United States."

U. S. Code, title 12, ch. 12, sec. 1463 (a). (App. 87).

The Attorney General of the United States has ruled the H. O. L. C. to be

"... in everything but form, a bureau or department of the Federal government. It is regulated and directed by Federal officials; all of its capital stock is furnished by the government; it is given free use of the mails." 37 Op. Atty. Gen. 241, 244 (1933).

The Supreme Court of the United States has recognized the H. O. L. C. as an arm of the Federal government for the purposes for which it was created.

Pittman v. H. O. L. C., 308 U. S. 21, 32 (—)

See also *Graves v. New York*, 306 U. S. 466, 477, 486 (1938)

The state courts have characterized the H. O. L. C. as an arm of the government.

Comm. v. Rouse, 163 Va. 841, 178 S. E. 37, 39 (1935)

The Home Owners Loan Corporation is operated directly and exclusively by Federal officers. The Federal Home Loan Bank Board members—themselves appointees of the President—were ordered by Congress to create the Home Owners Loan Corporation, to serve as the board of directors of the H. O. L. C., *without additional compensation*, and to operate the H. O. L. C. "under such by-laws, rules and regulations as it may prescribe for the accomplishment of the purposes and intent of this section."

Sections 1462 and 1463 (a)

The employees of the H. O. L. C. are considered employees of the United States.

Comm. v. Rouse, supra
Walker v. H. O. L. C., 25 F. Supp. 589 (1938)

The entire stock of the H. O. L. C. was subscribed for by the Secretary of the Treasury on behalf of the United States.

Section 1463 (b)

The obligations of the H. O. L. C. are obligations of the United States, and guaranteed principal and interest by the government; and in case the H. O. L. C. is unable to pay, are paid by the Secretary of the Treasury out of monies in the Treasury.

Section 1463 (c)

The risk of the undertaking lies entirely upon the United States; and into the Treasury of the United States go all surplus and profits.

Section 1463 (k)

Congress has specifically clothed the H. O. L. C. with most of the sovereign immunity from taxation. Its bonds are exempt both as to principal and interest from all Federal and state taxation, except Federal surtax, estate, inheritance and gift taxes; the corporate franchise, capital, reserves and surplus are exempt from all taxation. Only with respect to its real property did Congress waive this immunity.

Section 1463 (c)

Its mortgages cannot be subjected to a state tax.

Pittman v. H. O. L. C., 308 U. S. 21 (1939)

Sabin v. H. O. L. C., — Okla. —, 105 P. 2d 245 (1940)

H. O. L. C. v. Anderson, — Kan, —, 64 P. 2d 14 (1937)

It is immune to state laws demanding certain requirements of "foreign corporations."

H. O. L. C. v. Stookey, 59 Idaho 267, 81 P. 2d 1096 (1938)

Severson v. H. O. L. C., 184 Okla. 496, 88 P. 2d 344 (1939)

H. O. L. C. v. Barone, 164 Misc. 187, 298 N. Y. S. 531 (1937)

It is entitled "to the free use of the United States mails for its official business in the same manner as the executive departments of the Government."

Section 1463 (j)

The financial affairs of the H. O. L. C. are regulated as those of any other department of the Federal government. It is forbidden to "incur any expense for administrative purposes except of an annual appropriation by Congress for that purpose" and all such expenses are required "to be accounted for and audited in accordance with the terms and provisions of the Budget and Accounting Act of 1921."

Act of May 23, 1938, c.—, sec. 4, 52 Stat. 410

In 1939 the H. O. L. C. was included in the agencies over which the Federal Loan Administrator was given supervisory powers and the responsibility of coordination of functions and activities.

Reorg. Plan No. 1, sec. 402, U. S. Code, title 5, section 133t, note.

In recovering back the money lent home owners on mortgages it is performing a public function.

H. O. L. C. v. Grundy, 122 N. J. L. 301, 4 A. (2d) 784 (1939)

It has long been settled that Congress may create and use any instrumentality it may deem appropriate to carry out the powers conferred upon it by the Constitution.

McCulloch v. Maryland, 4 Wheat (17 U. S.) 316 (1819)
Clallam County v. U. S., 263 U. S. 341 (1923)

This power includes the power to create corporations for the exercise of governmental functions.

Clallam County v. U. S., *supra*

The fact the government chooses to act through the corporate form rather than an old-line executive department is immaterial on the issue of sovereign exemption.

Walker v. H. O. L. C., 25 F. Supp. 589 (1938)

Congress has the full power to determine the sovereign powers and immunities of its instrumentalities, and the intention of Congress as determined by express declaration or the rights, powers and privileges conferred on the instrumentality are determinative.

Helvering v. Gerhardt, 304 U. S. 405 (1938)
Pittman v. H. O. L. C., 308 U. S. 21 (1939)

The rights, powers and privileges which Congress conferred on the H. O. L. C. are inconsistent with any theory other than that the H. O. L. C. is a sovereign instrumentality of the government itself.

Adams v. H. O. L. C., 107 F. 2d 139 (1939)

The decisions which hold the H. O. L. C. suable in tort

E. g., Prato v. H. O. L. C., 106 F. 2d 128 (1939)

or subject to garnishment.

E. g., Central Market v. King, 132 Neb. 380, 272 N. W. 244 (1937)

rest on an interpretation that Congress has expressly waived the immunity of the H. O. L. C. from the judicial process. Congress has authorized suits against the United States itself in certain cases.

See United States Code, title 28, sections 761 et seq.

The purposes of the H. O. L. C. fall directly within the constitutional powers of Congress to tax, borrow and make appropriations for the general welfare.

U. S. v. Kay, 89 F. 2d (19) (1937)

Markowitz v. Berg, 125 N. J. Eq. 56, 4 A. 2d 410 (1939)

The only functions it is authorized to perform are governmental in nature. This is no business partnership; its only contacts with the commercial field are incidental contacts arising from the refinancing of existing private mortgages.

The cases which apply the commercial concept to other corporations in which the government is interested can all be distinguished either by split ownership or control; incorporation under local laws, or other features different from the exclusive creation, ownership, control, risk, or financing by the United States.

What sort of title does the government take when it acquires title thru an H. O. L. C. foreclosure? Does it pass title free from racial restrictive covenants?

Express authority on the first question has not been found; but it is submitted that from the elements of sovereignty cloaking the H. O. L. C. and the use of public funds and guarantee of all H. O. L. C. obligations by the United States the foreclosure passes title to the government in its sovereign capacity.

A deed to the state is not forfeited because the property is not used for purposes restricted by the deed.

See *State v. Lake Shore R. Co.*, 1 Ohio N. P. 292 (—)

If the land in question had been sold to the defendants at a tax sale, they would have taken free from the racial restrictive covenant.

Ocean Beach Improvement Co. v. Jenkins, — Fla. —, 194 So. 787 (1940)

The federal law is that a valid tax deed clothes the purchaser with a new and complete title in the land, under an independent grant from the sovereign which bars all prior titles, encumbrances and all equities arising out of them.

See *Hefner v. Northwestern Mutual Life Ins. Co.*, 123 U. S. 747, 751, — L. ed. — (1889)

Authority to the same effect is not lacking in the states.

E. g., *Hunt v. Boston*, 183 Mass. 303, 167 N. E. 244 (1903)

Hill v. Williams, 104 Md. 595, 65 A. 413 (1906)

Almogardo Imp. Co. v. Hennessee, 40 N. M. 162, 56 P. 2d 1127 (1936)

The purchaser from one holding under a tax deed is as fully protected as a bona fide purchaser.

See *Atlanta Nat. Bldg. & Loan Ass'n v. Gilmer*, 128 F. 293, 298 (1904)

There is no fundamental distinction between a sale of land for taxes due the United States, and a sale of that same land for the satisfaction of a mortgage debt due the United States. In each case the government is getting merely what was due it. In each case the government exercises its sovereign prerogative in passing to the purchaser its own title in order to replenish its treasury.

If the United States had acquired title to the land here involved by eminent domain, the restrictive covenant would have been extinguished. This proposition is too plain for argument. Yet the plaintiffs below would not have been entitled to any compensation for destruction of the restrictive covenant (assuming it was binding and ran with the land).

Moses v. Hazen, 63 App. D. C. 104, 68 F. 2d 842 (1934)
U. S. v. Certain Lands, 112 F. 622 (—)

Eminent domain is merely one method of acquiring title, and only a method. Suppose the government had decided to erect a court house on Square 2866. Would it be contended that if the government acquired the Hundley, Gorewitz and Bogikes properties by voluntary purchase instead of eminent domain that Negroes would be trespassers when they stepped on such parcels but not elsewhere in the square.

The government paid full value for the Hundley property. A public auction sale is one device for ascertaining value just as the award of a jury of condemnation is another. When the government paid full value for this particular lot, it took an unrestricted title, and as sovereign could not be bound by a perpetual restrictive covenant against one class of its citizens.

Would it be contended that Congress by mere legislative fiat without payment of any compensation could not transfer title from the H. O. L. C. to the United States Housing Authority, the Secretary of War or any other governmental

agency? If Congress can do this, the reason is that title has been vested in the sovereign United States.

Let us suppose Congress desired to use this property while the United States held the title as a dormitory for war workers. Would Negro citizens engaged in government war work be barred from residence, renting rooms, because of the covenant? Or suppose the Army wanted to use this property as quarters for Negro officers stationed in Washington. Would any court issue an injunction against the Negro officers based on the restrictive covenant?

The method by which the government acquires title: whether thru a special agency of its own or thru an old-line executive department is immaterial.

Clallam County v. U. S., supra

After acquiring its paramount title the government, thru its *alter ego* the H. O. L. C., could not continue the prohibition of this perpetual restrictive covenant. It could neither command nor permit that the property be owned perpetually by one class of its citizens to the exclusion of another class, based solely on race or color. Such would be directly opposed to the Fifth Amendment and the Civil Rights Act giving all citizens equal right to acquire property.

U. S. Code, title 8, section 42. (App 86).

The implication of a contrary position is that the government can take public money from the Treasury to which all citizens have contributed according to their means, and use that money to perpetuate discriminations against one class of its citizens forever, based solely on race or color. If it could do this, it could perpetuate discriminations against Catholics in favor of Protestants. Or to make the illustration more extreme, the plaintiffs below would have to argue that the H. O. L. C. could make a loan on property subject

to a perpetual restrictive covenant that only white Catholics might own and occupy the land, then after default by the white Catholic owner, foreclosure and purchase by the government at public auction, the government's resale market would be closed to Mexicans, Negroes, and all white Protestants.

In the instant case the record shows that the H. O. L. C. had a mortgage loan on the Bogikes property, foreclosed, purchased, and then sold to the Bogikes for \$8,000.00 when it was asking \$9,500.00 and had a \$10,000.00 offer from a Negro bishop. (App. 39, 78). Can government officials be excused for not getting back into the public treasury all the money they can? Suppose this property were sold at an advance, that would merely go to offset losses on other properties in the total operation of the H. O. L. C. The government is under an imperative duty to save the public treasury from loss.

Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060, 1089 (1842)

H. O. L. C. v. Grundy, *supra*

The funds of the United States are specifically appropriated to certain national objects. It is well settled that the United States cannot hold property for private purposes.

Van Brocklin v. Tennessee, 117 U. S. 151, 29 L. ed. 845 (1886)

U. S. v. Insley, 130 U. S. 263, 32 L. ed. 968 (1899)

Buchanan v. Alexander, 4 How. 20, 11 L. ed. 857 (1846)

The United States cannot own property except in its governmental capacity.

U. S. v. Iron Works, 31 F. 2d 535 (1929)

Its power of disposition of federally-owned property must

be in accordance with public policy and with the public interest.

Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 338, — L. ed. — (1936)

We concede that the H. O. L. C. was to help all home owners. In this case the white home owner was helped. He got his loan. The purpose of the Act was fulfilled. Our problem does not arise until he defaults. Then when the government starts salvage proceedings by way of foreclosure if the neighbors want to save the covenant (assuming it is binding on private owners) let them buy the property in at the foreclosure sale. Let the entire block owners buy it in. Let the whole Citizens Association buy it in. But can they stand by, permit the government to buy it in and the property to become part of the public assets of the United States, and then insist the government be a party to discriminating against an entire class of its citizens solely because of race or color?

In the instant case the record shows that the deed in trust securing the H. O. L. C. loan made no reference to the covenant. The trustees deed to the H. O. L. C. did not refer to the covenant. The H. O. L. C. deed to Holmes, the Hundley's grantor, made no reference to and ignored the covenant. (App. 72). There is record proof that the covenant had ceased to become a part of the chain of title after the property had passed into the ownership and control of the United States.

The covenant, so far as it would impose any obligation on the United States, or its *alter ego*, the H. O. L. C., or its successors in interest, must rest on an obligation implied in law. There was no express agreement by the government to observe or respect the covenant (assuming it could legally do so). There cannot be a covenant implied in fact because that would be to fly directly in the teeth of the Statute of Frauds.

D. C. Code, 1929, title 11, sec. 2, p. 117.

But the covenant could not arise by implication of law against the government where such implication violates the declared public policy of the government itself.

U. S. Code, title 8, section 42, *supra*

The decisive fact in this connection is that the government acquired title in the course of performing a public function and its courts cannot raise an implication of law against the government contrary to the public policy of the government itself against race discrimination.

It may be argued that for the government to accomplish an extinguishment of the restrictive covenant the constitutional rights of the white owners would be violated. The answer is they have no property right in the Hundley land for which they are entitled to compensation.

Moses v. Hazen, supra

They have no constitutional right to demand that the government be a party to race discrimination.

The desire of plaintiffs below to keep Negroes out of the Hundley property reduces itself down to purely social considerations. The record negatives any idea of economic loss or depreciation of their property. (App. 48, 53).

The law cuts both ways. The United States Supreme Court has held as against Negroes that social interests are not within the constitutional protection.

Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256 (1896)

The Court is bound to make the same ruling as to whites. The white owners and the white neighbors have to accept government aid subject to constitutional limitations that they cannot call on the courts to protect them in their purely social prejudices.

Recital of the covenant in the deed from Holmes to the Hundleys could not revive the covenant which had been extinguished by the previous conveyances without notice.

The mere recital "subject to the covenants of record" in the deed from Holmes to the Hundleys (App. —) did not revive the covenant. Assuming that Holmes could adopt the covenant and revive it, the record is clear that he did not intend to do so. In the first place, such an intention would have been wholly inconsistent with his direct sale to the Hundleys who are Negroes. The obvious reason why he had the recitation made in the deed was to protect himself from liability and save himself the burden and bother of a law suit. Holmes' testimony is conclusive on this point:

"Direct Examination

"By Mr. Gilligan: . . .

"Q. Just what is in there regarding the question of a restrictive covenant?

"A. They (the Hundleys) would have five days to investigate the covenant before they signed, thru the title company, and if they did not care to carry it thru, I would refund their money.

"Q. Anything else?

"Yes, if they did carry it thru, I was to be relieved of any obligation, or legal action of any kind." (App. 45, 46).

The record makes it clear beyond the shadow of a doubt that Holmes was not trying to confer any benefit on the Gorewitzes by the recital of the covenant because he testified that the reason he gave up his plan to use premises 2530 as his home was because he did not want to live next to Mrs. Gorewitz (App. 46). Bogikes' name never entered Holmes' testimony. There is nothing to indicate that Holmes had ever seen or heard of the Bogikes until the trial of this case.

There was no priority of contract between Holmes and

Gorewitz, or between Holmes and Bogikes. Holmes had no other property in the neighborhood which the restrictive covenant might "benefit." There was no building scheme or community development in progress which Holmes could be held to have adopted. The truth of the matter was that he recognized there might be a dispute over the Hundleys taking the property, and he was playing safe.

A restrictive covenant to be enforceable must be shown to have been put on the land for the benefit of the land owned by the third party, and in determining that question the court will regard the intent of the parties.

Herb. v. Gerstein, 41 F. Supp. 634, 635 (D. C., Dist. Col., 1941)

Therefore there was no revival of the covenant by the recital in the Holmes deed in this case.

II

The Court erred in ordering appellants to remove from the property because the covenant does not prohibit the occupancy and possession of the property by a Negro.

The prohibitions expressed by the restrictive covenant in this case are that the property be never "rented, leased, sold, transferred or conveyed unto any Negro or colored person." Being in derogation of the fee the covenant is to be construed strictly and every intendment taken in favor of the free use of the property.

Zinn v. Sidler, 268 Mo. 680, 187 S. W. 1172, L. R. A. 1917 A., 455 (1916)

The court exhausted its power, assuming the validity of the covenant, and its binding effect on Holmes and the Hundleys, when it cancelled the deed from Holmes to the Hund-

leys. It could put Holmes under an injunction not to rent or lease to the Hundleys, but if he chose to permit them to remain in possession by sufferance, the covenant would not be breached.

It may be argued that this would practically nullify the force of the covenant. The answer is that neither Holmes nor the Hundleys nor the Court made the covenant, and it is the function of the Court to construe the covenant as written, not to revise it.

III

The Court erred, to the material prejudice of appellants in

A. Excluding the evidence proffered as to the economic and social laws controlling the cycle of residential use of real estate.

The position of the trial court in this case was that he was simply interested in the question as to the particular area in which the property in question was located (App. 65) and to the facts involved in this particular action (App. 66). Thereafter appellants tendered Dr. E. Franklin Frasier, an expert sociologist, who had made a study of the city of Washington to testify as to changes in the character of this particular neighborhood (App. 83). The court excluded the evidence. The court did accept a plat of the surrounding territory showing the character of the racial occupancy and attached said plat to his findings of fact. (Typewritten Transcript, p. —). But as appellants pointed out this was merely a static picture of the neighborhood at one particular historical moment (App. 65). It did not go beyond, and show the forces at work or give any indication of the rate of change, the degree of change or why.

It is submitted that this case was not as simple as the plaintiffs below made it appear from their counsel's opening statement: that there was the covenant in the deeds

to the properties, a violation with notice by the Hundleys who were colored and therefore an injunction would lie. (App. 22). The court was not merely traveling over old ground with the facts on all fours with previous decisions. This case called for an extension of existing precedents if the covenant was to be upheld.

That meant consciously or otherwise the court had to consider or at least project his decision against a certain mental picture of the ends to be achieved by his decision. A certain picture or set of social consequences is delineated in the issuance of the injunction: a static picture. Certainly appellants had the right to present the other side: the growth of the population, the path of the population, the futility of the injunction and the consequences attendant upon establishing a little island of 4 houses, not enough to constitute a neighborhood, which would be set out in the middle of a flood.

In *Grady v. Garland*, *supra*, Mr. Justice Van Orsdell said that covenants were for the very purpose of stemming the movement of the Negro population (at p. 75). Certainly appellants were entitled to make their proof that these covenants do not stem the movement of the Negro population; that under pressure of economic laws and population growth the movement of population sweeps on and over these covenants.

The Court unduly restricted the area of proof. As illustration of the prejudice suffered by appellants and as a demonstration of the way these economic and population laws were working right in this very neighborhood, a Negro purchased property directly across the street from the parties to this suit between the date of trial and the date the judgment was rendered.

It may be argued that there was no covenant on this latter house, and therefore plaintiffs below could not be prejudiced by anything happening on those premises. But the answer is that the covenanted segment of the block is not isolated; that it is part and parcel of the block and bound to be affected

by changes occurring in the ownership and occupation of property therein. Therefore, merely looking at the condition of the block at any one moment without taking into consideration the rapid changes in the surrounding territory, the history of the neighborhood and the cycle of real estate use, is discarding the meat and looking merely at the shell.

B. Excluding the evidence whether appellee Bogikes would remain in her house if the Fleets remained in theirs.

This question (p. 42) went to the heart of the position of plaintiff Bogikes in asking the court to issue its injunction. The court would not issue an injunction to accomplish a vain thing. It would not set aside the sale to the Hundleys if the Bogikes actually sought no benefit thereby. The record shows that both as to the Gorewitzes and the Bogikes their personal complaints were against the Fleets. The Fleets were the ones they claimed were disturbing the block. The Fleets were the ones the neighbors wanted out of the block. Therefore her answer whether she would remain if the Fleets did was most material.

The error was not cured by the fact that shortly before she had stated she did not think she would stay if the Fleets did (App. 41) because immediately thereafter she stated she was sure the neighbors would not let the Fleets remain. And the question became material, supposing there was no way to get the Fleets out and they intended to remain, would she remain. That answer, if in the negative, would have been sufficient ground for the court denying her the injunction, especially after Fleet himself had taken the stand and said he had no intention of leaving.

C. Excluding the evidence regarding Negroes being able to and actually crossing the color line because of proscriptions on them because of race.

There is a sermon in this point for those willing to read. White people defeat their own ends by rigid inflexible pro-

scriptions against Negroes. They compel Negroes to pass for white and infiltrate among them: in their homes, *in their families*; and then where are the white people. They are not able to tell who is who. The record shows how completely mistaken Mrs. Gorewitz was in her ability to tell colored from white (App. 30-31, 72). Appellants offered to prove that Preston who bought the Fleet house and sold to them was a Negro who was mistaken for white App. 69). The evidence showed that appellant Mrs. Hundley had been mistaken as not being a Negro at college (App. 69). The proof that appellants could have produced about Negroes living and working as white would have shocked the court. Appellants urge that it is time for the courts to pause and give some consideration to the traps the white people are digging for themselves, and the extent to which they are undermining their own circles by the senseless proscriptions against respectable Negro citizens having decent housing, minding their own business, on the basis of an attitude fast dying in many parts of the world.

IV

Enforcement of the covenant by the court is governmental action, and constitutes a taking of appellants' property without due process of law contrary to the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States prohibits the deprivation, by action of the United States government, of life, liberty or property without due process of law. The general scope of this prohibition against the Federal government is the same as the restraint imposed on the states by the due process clause of the Fourteenth Amendment.

Heiner v. Donnan, 285 U. S. 312 (1932)

Twining v. New Jersey, 211 U. S. 78 (1908)

The prohibitions of the due process clause of the Fifth Amendment apply to the legislative, executive and judicial branches of the United States alike.

See *Murray v. Hoboken Land & Imp. Co.*, 18 How. 272 (1856)

After the United States had acquired and passed on to its purchaser Holmes a paramount title free from the racial restrictive covenant (See Argument I, C, *supra*), it could not enforce this covenant on the facts of this case without taking appellants' property without due process of law against the prohibitions of the Fifth Amendment.

It matters not that in the District of Columbia the courts have worked out a judicial policy of protecting these covenants without the aid of legislation. A judicial policy is as much within the prohibitions of the constitutional amendments as legislative action.

American Federation v. Swing, 312 U. S. 321, 85 L. ed. 855 (1941)

Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676 (1880)

V

The injunction is futile because the object of the covenant cannot be attained.

The object of the restrictive covenant of necessity must have been, if anything, to keep the six Willson & Wardman houses white. How it could actually have any purpose at all in view of the omission of the covenant in the title to house No. 2 is difficult to see; but if it had a purpose and was not a mere joker to catch purchasers, the purpose must have been to keep the six houses white. They are not white any longer. House No. 2 is occupied, and prior to the purchase of their property by the Hundleys was occupied, by a Negro family. That sets a Negro family right in the middle of the segment. Another Negro has bought property directly across the street.

Does that work a change of neighborhood? Some courts have held that two Negroes in a block do not work such a change in a neighborhood as to nullify the covenant and render it useless.

Meade v. Dennistone, supra

But in the Meade case the opinion shows there were 29 houses in the block, of which 28 were under covenant. The percentage of 2 Negro families in the 29 house block is 6.8 per cent; the percentage of the one Negro family in the 28 covenanted houses is 3.5 per cent. In the principal case the percentage of 2 Negro families in the six house segment is 33.3 per cent; the percentage of the one Negro family in the 5 covenanted houses is 20 per cent.

If this is not considered sufficient to constitute such a change in the character of the six-house segment as to nullify the covenant (assuming it to be otherwise binding) and render it useless, appellants respectfully call attention to the difference between the way prejudice works on human beings and on property. When it comes to human beings one drop of Negro blood classifies the entire person a Negro for purposes of discrimination and segregation. Yet when it comes to property that white people wish to keep Negroes have to preponderate before the neighborhood becomes black. We appeal to reason and the latent sense of fairness in the Court to wipe out such inconsistencies.

If the object of the covenant is to pander to appellees' prejudices, then the injury to their feelings from the presence of the Negro family, the Fleets, is fatal and they cannot be cured. So the presence of the Hundleys is immaterial.

The court will not grant an injunction if the object of the covenant cannot be attained.

Letteau v. Ellis, 10 P. 2d 496 (Ct. App. Cal., 1932)

CONCLUSION

Appellants appeal to a new day, a new spirit of national unity, a new sense of tolerance and fair play to have the Court critically examine old concepts and old decisions, feeling sure that a critical re-examination will lead it to reverse the judgment of the District Court with directions to dismiss the complaint.

Respectfully submitted,

CHARLES H. HOUSTON
615 F Street Northwest
Attorney for Appellants.

SPOTTSWOOD ROBINSON, JR.
Of Counsel.

APPENDIX

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APPENDIX

COMPLAINT FOR INJUNCTION

The plaintiffs respectfully represent to this Honorable Court, as follows:

1. That plaintiffs are citizens of the United States and residents of the District of Columbia.

2. That the defendants are citizens of the United States and residents of the District of Columbia.

3. That defendants, Frederick F. Hundley and Mary G. Hundley, are the present owners of record, as tenants by the entirety, of a certain parcel of real estate in the District of Columbia, described as: "Lot numbered Seventy-seven (77) in Harry B. Willson's subdivision of lots in Block numbered Thirty (30), 'Columbia Heights', as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 38 at folio 174", and now known as Lot 821 in Square 2866, with improvements known as 2530 13th Street, Northwest.

4. That the plaintiff, Rebecca Gorewitz, is the owner in fee simple and the occupant of Lot 822, Square 2866, improved by 2528 13th Street, Northwest. The plaintiffs, Paul W. Bogikes and Marion O. Bogikes, are the owners in fee simple, as tenants by the entirety, and occupants of Lot 75, Square 2866, improved by 2534 13th Street, Northwest. Plaintiffs are persons of the White race. Defendants Frederick F. Hundley and Mary G. Hundley, his wife, are persons of the Negro race or blood and are occupying said 2530 13th Street, Northwest.

5. That all the real estate described herein as being owned by the plaintiffs and defendants is located on the West side of Thirteenth Street, Northwest, between Clifton and Euclid Streets in the District of Columbia; that all of the properties herein described were erected and sold by or through Harry B. Willson and Harry Wardman, as joint tenants; that said properties, as well as Lots 820,

823 and 824, all of which front on Thirteenth Street, were erected and sold through said Willson and Wardman, and said group of houses is known as "Harry B. Willson's subdivision of lots in Block numbered Thirty (30) 'Columbia Heights', as per plat recorded in the Office of the Surveyor for the District of Columbia in Liber 38 at folio 174"; that said Willson and Wardman sold the same by and through the usual form of deed in which the following covenant, running with the land, has appeared in the deeds to all the properties in said subdivision, with the exception of the deed to lot 823, including the properties now owned by the plaintiffs herein and the property now owned and occupied by the defendants, Frederick F. Hundley and Mary G. Hundley, all or which said deeds were duly recorded among the land Records of the District of Columbia:

"Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars (\$2,000.00), which shall be a lien against said property."

6. That by deed, dated September 29, 1910 and recorded October 4, 1910, in Liber 3364 at folio 214 of said Land Records, Harry B. Willson and Harry Wardman conveyed said Lot 821, Square 2866 (Lot 77, Block 30 "Columbia Heights") to William A. Folger and Rebekah Folger, his wife. Thereafter, by *mesne* conveyances, the defendant, Nelson D. Holmes, became the owner of said property by deed from the Home Owners' Loan Corporation recorded among said Land Records on January 13, 1941 as Instrument No. 1185. By deed, dated January 17, 1941 and recorded among said Land Records on January 23, 1941, as Instrument No. 2419, said defendant, Nelson D. Holmes, a person of the white race, conveyed said property to the defendants, Frederick F. Hundley and Mary G. Hundley, and the said deed contains the language: "Subject to the covenants of record".

7. That all the properties in said 2500 Block of 13th Street, Northwest, are now owned and occupied by persons of the White race except the property the subject-matter of this suit and 2526 13th Street, Northwest, the ownership and occupancy of which is now the subject of suit in this Court in Civil Action No. 10551.

8. That on March 14, 1941 the plaintiffs caused written notices to be sent by registered mail, postage prepaid, to the defendant Holmes and defendants Hundley notifying each of them that said conveyance, ownership and occupancy are in contravention of the covenant restriction. Plaintiffs aver that defendants Hundley and Holmes are charged by law with notice and knowledge of said covenant of record herein set forth, running with the land; that all of said defendants, before accepting said deed and before the defendants Hundley moved into said property, did have actual knowledge of said covenant of record; and that the defendants knowingly and willfully consummated the transaction and the defendants Hundley became the owners and occupants of said property in contravention of said covenant of record, which has never been abrogated or nullified and is now in full force and effect.

9. That said parcels of real estate herein described and belonging to plaintiffs were each acquired by said plaintiffs, respectively, subject to and restricted by said covenant of record; that all the plaintiffs and defendants derive title either directly or by mesne conveyances from Harry B. Willson and Harry Wardman; that all of the plaintiffs purchased his, her or their said dwellings upon the advice and under the belief that said covenant was binding upon said plaintiffs as well as upon owners of all property in the portion of Square 2866 developed by said Willson and Wardman, and that all of said property was subject to the same covenant and restriction; that said neighborhood is residential in character and the property located therein is of good value.

10. Plaintiffs aver that the above mentioned deed and conveyance of Lot 821, Square 2866, and improvements thereon, from Nelson D. Holmes to Frederick F. Hundley and Mary G. Hundley, his wife, persons of the Negro race or blood, are a nullity and of no effect, and said deed and conveyance confer no property rights upon said defendants Hundley for the reason that they unlawfully and willfully acquired said deed and accepted said conveyance in violation of the aforesaid covenant of record; that the continued occupancy of said property by the defendants Frederick F. Hundley and Mary G. Hundley, as well as to permit the deed and conveyance from said Nelson D. Holmes to Frederick F. Hundley and Mary G. Hundley to remain a matter of record, and said grantees to continue the owners and occupants of said property, will be injurious, depreciative and absolutely ruinous of the real estate owned by plaintiffs and will be harmful, detrimental and subversive of the peace of mind, comfort and property rights and interests of plaintiffs and of other property owners, and said neighborhood will become depreciative in value, and undesirable as a neighborhood wherein white people may live; that the continued occupancy and/or ownership by the defendants Frederick F. Hundley and Mary G. Hundley, or any person or persons of the Negro race or blood, will constitute a continuing wrong and injury that is irreparable, and is incapable of ascertainment and compensation in damages, and the only adequate remedy is by way of injunction.

WHEREFORE, plaintiffs demand:

1. That the defendants Frederick F. Hundley and Mary G. Hundley be enjoined, during the pendency of this suit, and permanently thereafter, from selling, renting, leasing, transferring or conveying premises 2530 13th Street, Northwest, in the District of Columbia, to Negroes or colored persons or persons of the Negro race or blood, and from permitting said premises to be occupied by said Negroes or persons of the Negro race or blood.

2. That the defendants Frederick F. Hundley and Mary G. Hundley be enjoined, pending this suit, and permanently thereafter, from occupying premises 2530 13th Street, Northwest, in the District of Columbia, and that said defendants, by order of this Court, be directed to vacate immediately said premises, and to remove therefrom all household goods and other property belonging to said defendants.

3. That the deed dated January 17, 1941 and recorded January 23, 1941 as Instrument No. 2419 among the Land Records of the District of Columbia from the defendant Nelson D. Holmes to defendants Frederick F. Hundley and Mary G. Hundley, his wife, be cancelled, and a judgment be entered herein declaring said conveyance void and of no effect, and further declaring title to be in Nelson D. Holmes, subject to the restrictions of the covenant of record herein set forth.

4. That plaintiffs have judgment for costs, and that a reasonable attorneys' fee be allowed.

5. That they be allowed such other and further relief as shall be required.

REBECCA GOREWITZ (Seal)

PAUL W. BOGIKES (Seal)

MARION O. BOGIKES (Seal)

DISTRICT OF COLUMBIA, SS:

Rebecca Gorewitz, on oath deposes and says that she is one of the plaintiffs in this cause and she has read the foregoing complaint by her subscribed; that the statements therein made are true to the best of her knowledge, information and belief.

REBECCA GOREWITZ, (Seal)

Subscribed and sworn to before me this 5th day of April, 1941.

VINCENT P. BOUDREN,

Notary Public, D. C.

HENRY GILLIGAN (Seal)

JAMES A. CROOKS (Seal)

Attorneys for Plaintiffs

ANSWER (As Amended)

Defendants Frederick F. Hundley and Mary G. Hundley answer the complaint and motion for injunction pendente lite as follows:

1-3 They admit the allegations of paragraphs 1-3.

4. They admit that the occupancy and record titles stand in plaintiffs as alleged, but lack the information or knowledge necessary to a belief and therefore can neither affirm nor deny that plaintiffs are of the white race but call for strict proof if the same be material. They admit they are Negroes and are occupying premises 2530 13th Street, Northwest.

5. They admit the allegations of paragraphs 5.

6. They admit that Wilson and Wardman conveyed to Folger and wife as alleged; that the Home Owners Loan Corporation conveyed to Nelson D. Holmes and that Holmes conveyed to them with the deed reciting "subject to the covenants of record". They lack the information or knowledge necessary to a belief, and therefore can neither affirm nor deny that Holmes is of the white race but call for strict proof if the same be material.

7. They lack information or knowledge necessary to a belief and therefore can neither affirm nor deny the allegations of paragraph 7 except as to the occupancy of their own premises and of premises 2526 13th Street, Northwest, but call for strict proof if the other allegations be material.

8. They admit they received the written notice charged and that they knew of the existence of the covenant of record prior to accepting the deed from Holmes, but state that the remaining allegations of said paragraph contain conclusions of law which they are not bound to answer and do not answer.

9. They admit the allegations that the neighborhood is residential and the property therein of good value. They lack the information or knowledge necessary to a belief and therefore can neither affirm nor deny the circumstances under which plaintiffs purchased, but call for strict proof if the same be material. They deny they took or hold their property subject to the covenant of record.

10. They deny the allegations of damage or injury to plaintiffs jointly or severally or to the neighborhood by their ownership or occupancy of their property, and state that since purchasing their property they have spent more than \$2,000.00 improving it and it is now one of the most desirable properties in the block, comparable in every respect to the properties of the plaintiffs. They are advised the remaining allegations of the paragraph state conclusions of law which they are not bound to answer and do not answer.

First Defense

The covenant in question constitutes an unlawful restraint on alienation and is void ab initio, and as a perpetual restraint on alienation is against public policy and void.

Second Defense

The law will not decree specific performance of this covenant for that the records show that Wilson and Wardman built and sold six houses as a single development in 1910; said properties then being contiguous lots known as Lots 75 to 80 inclusive in Columbia Heights, Block 30. They sold some of the lots with deeds containing the covenant in question. At the same time as a part of the original plan they sold lot 79 which adjoins Lot 78, owned by plaintiff Gorewitz, without any covenant and with unre-

stricted right of alienation and occupancy. Said Lot 79 is now owned and occupied by Negroes. Defendants specifically deny there ever was any scheme or plan to perpetuate this development as a white residential area.

Third Defense

Defendants deny that there is any neighborhood created by the properties under the covenant herein sued on. Further they state that about 1928 plaintiffs and others tried to get a restrictive covenant signed by the property owners of the block which would blanket the block as a white residential area, but were unsuccessful and a large number of owners in the block refused to sign such a restrictive covenant. An injunction against these defendants would not guarantee the block, or even the small six lot segment developed by Wilson and Wardman to be a white residential area, and the law will not act where the very purpose and object of the action cannot be attained.

Fourth Defense

Defendants derive title by mesne conveyance from the Home Owners Loan Corporation, an agency of the sovereign government of the United States. The sovereign cannot be and is not bound by a private covenant between citizens; so that the covenant was extinguished when title to the property became vested in the United States thru its agency the Home Owners Loan Corporation.

Fifth Defense

The covenant after being extinguished by title vesting in the United States thru its agency the Home Owners Loan Corporation could not be revived by a mere recital in the deed that it was "subject to covenants of record". And defendants purchased in good faith on advice of their then

counsel that the covenant in question was void and of no effect.

Sixth Defense

Plaintiffs are barred by laches for that they permitted Negroes to occupy premises 2526 13th Street, Northwest, one of the houses in the small development for many months prior to defendants' purchase of their property, without objection of any kind, and acquiesced in such occupation.

Seventh Defense

Plaintiffs are estopped from asserting any objection against defendants owning or occupying their property for that plaintiffs by permitting another Negro family to occupy premises 2526 13th Street, Northwest, for months prior to defendants' purchase, peaceably and without protest, did represent to defendants that there was no objection to Negroes owning and residing in said houses provided they were otherwise individually acceptable; that they meant for defendants to act upon such representations, and in good faith relying thereon defendants did purchase their property, spend large sums improving the same, and move into and occupy it.

Eighth Defense

Since plaintiffs purchased their properties the neighborhood and area have become distinctly a *mixed neighborhood* and area of white and Negro residents.

Ninth Defense

After acquiring a paramount title the United States Government through *the Home Owners Loan Corporation*

could not pass on to one citizen a title excluding a whole class of citizens from becoming purchasers and occupiers of said property without violating the due process clause of the Fifth Amendment to the Constitution of the United States.

Wherefore defendants pray that the complaint be dismissed with costs.

HOUSTON, HOUSTON & HASTIE,
By CHARLES H. HOUSTON,
Attorneys for Defendants

STIPULATION

It is stipulated by and between counsel for the plaintiffs and the defendants Hundley, in the above-entitled cause, as follows:

1. The plaintiffs and the defendants Hundley are all owners of property in Harry B. Willson's subdivision of six lots in Square 2866. Said properties were conveyed by Harry B. Willson and Harry Wardman, the original builders, and the date of each of said original deeds and the date of recording thereof are as follows:

Lot 823, deed dated July 12, 1910, recorded August 16, 1910, Ins. No. 1.

Lot 824, deed dated Sept. 13, 1910, recorded Sept. 19, 1910, Ins. No. 42.

Lot 820, deed dated Sept. 17, 1910, recorded Sept. 23, 1910, Ins. No. 26.

Lot 822, deed dated Sept. 27, 1910, recorded Sept. 28, 1910, Ins. No.

Lot 75, deed dated Sept. 28, 1910, recorded Oct. 5, 1910, Ins. No. 83.

Lot 821, deed dated Sept. 29, 1910, recorded Oct. 4, 1910, Ins. No. 23.

2. Each of the above described deeds, excepting that

to Lot 823, contains a covenant in the following wording:

“Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars (\$2,000.00), which shall be a lien against said property.”

3. By deed dated January 17, 1941 and recorded on January 23, 1941, as Instrument No. 2419, the defendant Nelson D. Holmes conveyed Lot 821, Square 2866 to the defendants Hundley, as tenants by the entirety, the deed containing the language: “Subject to the covenants of record.”

4. The defendants Hundley are persons of the Negro race or blood.

J. A. CROOKS, *Attorney for Plaintiffs.*
HOUSTON, HOUSTON & HASTIE,
Attorneys for defendants HUNDLEY.

MOTION FOR LEAVE TO FILE A SUPPLEMENT TO ANSWER UNDER FEDERAL RULE 15 (d)

Defendants Hundley move the Court for leave to file a supplement to the Third Defense in their Answer by inserting the following before the last sentence under said heading. The matters involved here occurred since the Answer was filed, and have material bearing on the defense made herein:

The covenant also purported to cover the east side of 13th Street between Clifton & Euclid Street (Square 2865), houses which face the properties of plaintiffs; but at least the owners of three properties on the east side of the 13th Street refused to sign. One of the properties whose then owners, Otho W. Hammond and wife, Florence V. Hammond, refused to sign, was the

parcel known as Lot 16 and part of Lot 17, Square 2865, improved by a large dwelling house 2523 13th Street, Northwest, (picture of which is hereto attached). On September 27, 1941, they sold and conveyed said property to Joseph Kassner by deed recorded October 2, 1941, instrument No. 33726, in the office of the Recorder of Deeds for the District of Columbia. On November 19, 1941, Joseph Kassner under an assignment of a certain contract of sale sold and conveyed said property to Gertrude Savoy by deed recorded November 24, 1941, instrument No. 40,358. Gertrude Savoy is a Negro. Said property is used as a rooming house, at present occupied by whites.

HOUSTON, HOUSTON & HASTIE,
By CHARLES H. HOUSTON,
Attorney for Defendants.

AFFIDAVIT IN SUPPORT OF MOTION

DISTRICT OF COLUMBIA. SS:

CHARLES H. HOUSTON being first duly sworn on oath states that he has checked the records in the office of Recorder of Deeds in the District of Columbia and that the deeds listed in the *Motion for Leave to File a Supplement to Answer under Federal Rule 15 (d)* appear of record there as stated; that he knows Gertrude Savoy is a Negro; that Otho W. Hammond was the record owner of Lot 16 and part of Lot 17 in Square 2865 improved by premises 2523 13th Street, Northwest, in and prior to 1928.

CHARLES H. HOUSTON.

Subscribed and sworn to before me this.....day of November, 1941.

Notary Public, D. C.

Points and Authorities

Federal Rules of Civil Procedure, Rule 15 (d)

ORDER OVERRULING MOTION FOR LEAVE TO FILE SUPPLEMENT TO ANSWER

Upon motion of defendants Hundley for leave to file a supplement to their answer, the Court being of opinion that the matters sought to be presented by way of supplement are immaterial, it is this 1st day of December, 1941,
ORDERED

That the motion be, and it is hereby, denied.

MATTHEW F. MCGUIRE,
Justice.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This is an action brought by Rebecca Gorewitz and Paul W. and Marion O. Bogikes against Frederick F. and Mary G. Hundley and Nelson D. Holmes to enjoin the leasing or conveyance of certain real estate in the District of Columbia, to compel the defendants Hundley to vacate the same, and seeking a judgment declaring the conveyance of the real estate referred to, by the defendant Holmes to the defendants Hundley null and void.

Findings of Facts

The parties are citizens of the United States residing in the District of Columbia. The plaintiffs Gorewitz and Bogikes and the defendant Holmes are white persons, and the defendants Hundley are persons of the Negro race.

The plaintiff Gorewitz is the owner in fee simple and the occupant of Lot 822, Square 2866, improved by 2528 13th Street, N. W.; the plaintiffs Bogikes are the owners in fee simple as tenants by the entirety and occupants of Lot 75, improved by 2534 13th Street, N. W.

The defendants Hundley are the owners and occupants of

Lot 821 improved by 2530 13th Street, N. W. Their immediate grantor was the defendant Holmes, who received his title from the Home Owners' Loan Corporation, an instrumentality of the Government of the United States, and who subsequently conveyed to the defendants Hundley "subject to covenants of record."

All of the parcels of real estate referred to were acquired by both plaintiffs and defendants by mesne conveyances from Harry B. Willson and Harry Wardman as joint tenants, and are located on the west side of Thirteenth Street, N. W., between Clifton and Euclid Streets in the District of Columbia.

These properties as well as Lots 820 (76), 823 (79) and 824 (80), all of which front on Thirteenth are known as "Harry B. Willson's subdivision of lots in Block numbered Thirty (30) Columbia Heights," and duly recorded by plat in the office of the Surveyor for the District.

In all of the deeds of conveyance from Willson and Wardman, with the exception of that to Lot 823 (79), the following restrictive covenant appeared.

"Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars (\$2,000.00), which shall be a lien against said property."

This particular lot 823 (79)—the first lot sold out of the six by Willson and Wardman—which is located adjacent to and immediately to the south of Lot 822 (78) owned by the plaintiff Gorewitz came by mesne conveyance into the possession of one Fleet who is the owner in fee simple and occupant thereof and a member of the Negro race.

It also appeared and is found as fact that the defendants Hundley took with knowledge of the restrictive covenant herein referred to and as a matter of fact agreed to save their grantor Holmes harmless from any legal action which might possibly be brought against him by reason of the

same, evidencing their intention so to do by agreement in the contract of sale.

The area adjacent to the property here in question is residential in character, consisting of row houses and several large apartment buildings and the occupancy thereof, with respect to white and colored people, is found as a fact to be as shown by plat of the area stipulated by counsel and appearing in the record. There has been some occupation by Negroes on the side streets adjacent to 13th Street, in the general area in the last 15 years.

Defendants Hundley have spent about \$2,300.00 improving 2526 13th Street, since their purchase thereof.

Conclusions of Law

With reference to the contention that restrictive covenants of the kind referred to constitute an unlawful restraint on alienation and therefore are void *ab initio*, the validity of covenants and agreements of this nature have been generally upheld, especially in this District.

It is axiomatic that such restrictions constitute valid and solemn contracts which ordinarily will not be lightly set aside.

Nor does the fact that for some time there has been colored occupancy of Lot 823, adjacent to that of one of the plaintiffs affect the situation, which lot was sold by the original grantors and came down through mesne conveyances to the present occupant without written restriction. A general scheme of improvement or development may exist although a part of the lots may have been sold without the restriction.

With reference to the defense that this action cannot be maintained unless there is a general scheme for the improvement of the property and the restrictions were in all

the deeds, it is held, that where an owner divides a tract of land into building lots and, as a part of a general scheme for its improvement, inserts in the deeds of sale of all the several lots uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees who may enforce them in equity each for himself against the others. The fact that the original grantors had conveyed one lot without restrictions, was not very significant.

While it has been often held that where an owner divides a tract of land into building lots and, as a part of a general scheme for its improvement, inserts in the deeds of sale of all the several lots uniform restrictions as to the purposes for which the land may be used, such provisions inure to the benefit of the several grantees, who may enforce them in equity, yet the criterion in this class of cases is the intent of the grantor in imposing the restrictions, whether they are intended for his personal benefit or for the benefit of the lot owners generally; and his intention is to be gathered *from his acts and the attendant circumstances*. If this sufficiently appears, the fact that as to some lots there are no restrictions simply takes those lots out of the general scheme, and it is not necessary that the restrictions should be exactly the same in all the deeds. The evidence indicates a general scheme of development.

There is no merit in the defense that inasmuch as the defendants derived title by mesne conveyance from the Home Owners' Loan Corporation, that the Government in fact became the owner of the property and that the covenant became extinguished when the title vested in the Corporation. The Home Owners' Loan Corporation is as its title indicates, a corporate instrumentality of the United States and is a corporate instrumentality with authority to sue and be sued in any competent jurisdiction, Federal or State, all of its capital stock being subscribed to and owned by the Government of the United States.

When a government becomes a partner in any trading

company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted. A government never exercises its sovereignty in such a situation. It acts merely as a corporator, and exercises no other power in the management of the affairs of the corporation than are expressly given by the incorporating act.

Notwithstanding the fact that all of its stock was owned by the United States, it is a separate entity.

What has been said with reference thus to the fourth defense may also be said with emphasis in the matter of the fifth, namely, "that the covenant was extinguished when title to the property became vested in the United States through its agency the Home Owners' Loan Corporation."

Laches—It is, of course, true that a complainant seeking equitable relief against the violation of a restrictive covenant must act promptly upon the discovery of the ground for complaint, as otherwise his laches may bar his right to relief. There is no hard and fast rule as to what constitutes laches. The laches raised in this case is that the defendant took title to the property on January 7, 1941, by deed from Holmes, and this deed was recorded January 23, 1941, and that on March 14, 1941, the plaintiffs caused written notices to be mailed both to the defendants' grantor and the defendants, advising them that the conveyance in question was allegedly in violation of the covenant restriction. It was evidenced at the trial that the defendants knew of the covenant restriction, and as a matter of fact, by writing on the agreement of sale purported to release their grantor Holmes from liability thereunder. There is no question but what it would be contrary to equity and good conscience to enforce such a restriction if a defend-

ant had been led to suppose by word, silence, or conduct of the plaintiffs that there is no objection to his operations, as diligence is an essential prerequisite to equitable relief of this nature. Quiescence will be a bar when good faith requires vigilance, but so long as there is no knowledge of the wrong committed and no refusal to embrace opportunity to ascertain facts, there can be no laches. On the facts presented, the plaintiffs acted as seasonably and as expeditiously as possible when the alleged violation of the restriction was brought to their attention. Mere lapse of time, although important, is not necessarily a decisive consideration. As a matter of fact, within the somewhat rather flexible limitations of what appears to be the general rule above referred to—what may be laches in any case depends upon its peculiar facts.

Nor can the plaintiffs be barred for laches because Negroes occupied Lot 823, because said lot was never subject to the restriction, and as a consequence the plaintiffs had no rights with respect to same, and the defense of estoppel fails for the same reason.

While it may be true that the general area over a period of time has become what might be termed a mixed neighborhood of whites and Negroes, there has not been such a change in the *immediate* neighborhood as evidenced by the plat submitted by stipulation of the parties as to warrant equity to take cognizance of the fact that the enforcement of the covenant in question would be oppressive and that it would be inequitable to give it effect.

The ninth defense which states, "After acquiring a paramount title the United States Government through the Home Owners' Loan Corporation could not pass on to one citizen a title excluding a whole class of citizens from becoming purchasers and occupiers of said property without violating the due process clause of the Fifth Amendment to the Constitution of the United States" fails because

of what has been said with respect to the fourth and fifth defenses.

Dated: Dec. 1, 1941

MATTHEW F. McGUIRE,
Justice

JUDGMENT FOR PERMANENT INJUNCTION

This cause came on to be heard, and thereupon, upon consideration thereof, and it appearing to the Court that the restrictive covenant running with the land known as Lot 821 in Square 2866, improved by premises 2530 13th Street, Northwest, in the District of Columbia, created by deed dated September 29, 1910 and recorded October 4, 1910 in Liber 3364 at folio 214 of the Land records of the District of Columbia, providing that said land shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person, is in full force and effect; and it further appearing to the Court that the defendants, Frederick F. Hundley and Mary G. Hundley, his wife, are Negroes or colored persons and are the owners and occupants of said land and premises; and that the defendant, Nelson D. Holmes, a person of the White race, was the owner of record who sold and conveyed said land and premises to the defendants Hundley in violation of the provisions of said restrictive covenant; and that the defendants Hundley own and occupy said land and premises in violation of the provisions of said covenant, it is, by the Court this 1st day of December, 1941,

ADJUDGED, that Frederick F. Hundley and Mary G. Hundley, his wife, be and they hereby are permanently enjoined from ever owning, occupying, selling, leasing, transferring or conveying the land known as Lot 821 in Square 2866, and the improvements thereon, in the District of Columbia; and it is further

ADJUDGED, that Nelson D. Holmes be and he hereby is permanently enjoined from ever selling, leasing, transferring or conveying the land known as Lot 821 in Square 2866, and the improvements thereon, in the District of Columbia, to, or allowing the same to be occupied by, any Negro or colored person, and it is further

ADJUDGED, that the deed dated January 17, 1941 and recorded January 23, 1941 as Instrument 2419 among the Land Records of the District of Columbia be and it hereby is declared null and void and of no effect, and the title to said Lot 821 in Square 2866, with improvements thereon, is hereby declared to be in Nelson D. Holmes subject to the provisions of the restrictive covenant of record, aforesaid; and it is further

ADJUDGED, that Frederick F. Hundley and Mary G. Hundley, his wife, be and they hereby are ordered to remove themselves and all their personal effects from said land and premises within 120 days; and it is further

ADJUDGED, that Nelson D. Holmes be and he is hereby declared trustee for the defendants Hundley of the consideration heretofore received by him from them on account of their purchase of the aforesaid property, and upon any sale of the same by said owner the purchasers are charged with the duty of seeing to the application of the purchase money to and for the benefit of the defendants Hundley; and until Nelson D. Holmes returns to the defendants Hundley the consideration aforesaid, with legal interest from the date of this judgment, he shall further hold as trustee for the defendants Hundley the profits and income from said consideration in whatsoever form received, less trustee's commission of 5 per cent; and it is further

ADJUDGED, that taxable costs be assessed against the defendants, and each of them.

MATTHEW F. MCGUIRE,
Justice.

**TRANSCRIPT OF THE SHORTHAND REPORT OF THE
PROCEEDINGS HAD OCTOBER 16, 1941**

The above-entitled cause came on for hearing on this the sixteenth day of October, 1941, before Honorable MATTHEW F. McGUIRE, one of the justices of the District Court of the United States for the District of Columbia, whereupon the following proceedings were had, and testimony heard:

Appearances:

HENRY GILLIGAN, Esquire, and JAMES A. CROOKS, Esquire, appearing on behalf of the plaintiff.

C. H. HOUSTON, Esquire, appearing on behalf of the defendants.

Upon the call of the case to trial by the Clerk, counsel for the plaintiff and defendants announced that they were ready to proceed.

Mr. Gilligan: If your Honor please, this is an action involving the restrictive clause in certain deeds to property which the defendants bought from one Mr. Holmes. Mr. Holmes did not answer the complaint, and I presume so far as he is concerned we would be entitled to a judgment.

I think it would be well for your Honor to see this little map that we discussed when the matter of the preliminary injunction was before Judge Morris, when he advanced the case for trial.

The Court: That preliminary injunction was not granted?

Mr. Gilligan: No, we agreed that it should not be. This is not the case heard the other day, your Honor.

The Court: I understand the counsel are the same?

Mr. Gilligan: Yes, counsel are the same. My name is Henry Gilligan, and this is Mr. Crooks, and Mr. Houston represents the defendants. We have a stipulation here that I think it might be well for your Honor to have before you, a stipulation agreed upon before the pre-trial Judge. Do you have it before you?

The Court: I have it.

Mr. Gilligan: I thought it would be well to have that before your Honor in explaining this case. If you will notice, on the left-hand side you will have before you the property involved. Here is Lot 59. That is not included in this suit. This suits concerns here (indicated), 820, 821, 822 and 824. The stipulation will show you Lot 823, and if you will notice it is this piece of property, which was the first house sold. There are six houses there, and the first one sold was this Lot 823, and they did not put any restrictive provision in the deed as to color, but, in all of the other property, 820, 821, 822 and 824 the restrictive covenant was put in.

The Court: What was the date of the sale of 823?

Mr. Gilligan: That was sold under deed dated July 12, 1910, which was recorded on August 16, 1910.

The next sale of record is two months after that time, and then they were all recorded pretty close together. The last one was September 29. Two months intervened between the sale of the first one and the last one.

We will show you, or at any rate it is admitted that all of these deeds hold that provision as to color, and it is also stipulated that the defendant Huntley * and his wife are colored people, and the property they took, they took in the face of the provision in the deed, and subject to the covenant of record. You will see that is admitted in the stipulation.

Now, your Honor, if we are able to show you the facts as we have outlined them, that these folks bought with the knowledge of that covenant, we will ask, out of the decisions we have in the District of Columbia that your Honor grant the injunction.

Mr. Houston: I do not want to make my opening statement at this time. We demand strict proof, and we want to give the Court the benefit of all the facts.

I will defer my opening statement until I come to the presentation of our case.

Mr. Gilligan: I will call Mrs. Gorowitz.*

* Correct spelling Hundley and Gorewitz.

Thereupon:

Rebecca Gorowitz,

was called as a witness by and on behalf of the plaintiff, and, having been first duly sworn, assumed the witness stand, and was examined and testified as follows:

Direct Examination

By Mr. Gilligan:

Q. Mrs. Gorowitz, speak clearly so the Court will hear you. What is your name?

A. My name is Rebecca Gorowitz.

Q. Where do you live?

A. I live at 2528 13th Street, Northwest.

Q. Just where is that house in which you live in connection with the house occupied by the defendants, Mr. and Mrs. Huntley?

A. It is right next door to 2530.

Q. You are occupying one of these houses in the Wilkerson and Ward subdivision that has the covenant in the deed?

A. Yes sir.

Q. Is this the covenant, or the certificate of title you got when you bought the property?

A. Yes sir, this is the title.

Q. You bought the house when?

A. I bought the house in 1927.

Q. September 27, 1927?

A. Yes sir.

Mr. Gilligan: I call your Honor's attention to the Certificate in the deed which recites that this property shall not be sold or used for the manufacturing or sale of spiritual liquors, or transferred or conveyed to any negro under penalty of \$2,000.00 which shall apply as a lien against the property. The same language appears in all of these deeds. Will your honor care to see this?

The Court: Are you offering this?

Mr. Gilligan: I offer this as plaintiff's exhibit No. 1.

(The said deed so offered on behalf of the plaintiff, was marked "Plaintiff's Exhibit No. 1".)

By Mr. Gilligan:

Q. What did you pay for your house?

A. \$13,500.00.

Q. At the time you bought that house were you aware of the fact that there was a restrictive agreement against the sale to negroes, or occupancy by negroes?

A. Yes sir, I was. Mr. Davis sold me the house, and he told me that these particular houses were sold under a certain agreement never to be sold to colored people, and I took their word for it.

Q. Now, lets get to No. 2530 13th Street, regarding the purchase of that property by the Huntleys. Did you have any talk with Mr. and Mrs. Huntley and the defendant, Mr. Holmes, with reference to that proposed sale?

A. I have not spoken to Mrs. Huntley at all, but, I spoke to Mr. Huntley and he talked about putting in a new fence. I spoke to Mr. Holmes and also, the gentleman who was there when the house was inspected.

Q. Do you know what that gentleman is?

A. I think it is,—I don't know his name, but, I know he must have been an agent for the real estate. He came to the house, and I said, "what is it your wish to find out," and he said, "I wonder who owns this house," and I said, "no matter who owns that house, you can find it out, but I am sure this house cannot be rented for colored people." He said, "I am not asking you that question, whether it is for colored people or what." Then I said that Mr. Holmes, or his son, young Mr. Holmes, he was there most of the time around the house when they were repairing it, I asked him to whom the house was sold, and he said, "my dad bought it and is fixing it up for ourselves to live in," and I was very much pleased, and I did not bother about the people coming into my home to use the telephone for repairs and talking, for I did not want it like 2526; I tried to get these people out. Then at last I saw the house was fixed,

and I went out and asked the working people who was moving in the house. I still could not believe it. I tried to find out the truth, and they said that they thought colored people. But, Mr. Holmes had told me first he was fixing it as a home for him to move in.

Q. Did he say anything about whether or not there was a restrictive covenant in the deed?

A. No sir, he did not say anything. I told him I hoped they are not going to sell to colored people for these houses are restricted.

Q. Did you ever see this gentleman (indicating) in the company of Mr. and Mrs. Huntley?

A. Very often before they moved in, and in fact one night at 11:30 at night, Thursday night I saw that gentleman upstairs in the bedroom showing the house to people but, I do not know whether Mr. and Mrs. Huntley or not were colored people. I didn't know exactly. He had been showing the house at night. I saw the light upstairs. You can look right across, and when they talk over the telephone you can hear everything they say. The walls are very thin and close to each other.

Q. One other question, Mrs. Gorowitz, what is your color, white or colored?

A. My color, I am strictly white. I should say I am, for I was born in Poland, and I would like for you to look up in the Polish history, and you will never see any colored people. I never saw any colored people until I came to the United States.

Mr. Gilligan: You may cross-examine.

Cross-examination

By Mr. Houston:

Q. Mrs. Gorowitz, you said that the real estate people told you that all of the houses were restricted.

A. Yes, all the row is restricted, while the fact is it was not, for they have got colored people there.

Q. Now, these are the houses, are they not (indicating)?

A. Exactly, I know.

Q. There is Mr. Bagelly,* and there is where Judge O'Toole's house is?

A. Yes sir.

Q. What is that house (indicating)?

A. That is my house.

Q. This is the Fleet and this is the Morosky house?

A. Yes sir.

Q. These six houses do not constitute the entire block, or the entire square?

A. Of course, there are more but, they are attached one to another in the whole line.

The Court: May I ask this question of counsel, these pictures represent the houses by plan number and street number?

Mr. Houston: Yes sir.

(Thereupon there was a discussion at the bench between counsel for plaintiff and defendants and the court, which is not herein recorded by direction of the court.)

Mr. Houston: Now, if your Honor please, and Mr. Gilligan, may I suggest that you offer this diagram as plaintiff's exhibit No. 2?

Mr. Gilligan: That will be a good idea. I offer that as plaintiff's Exhibit No. 2.

(The said diagram so offered on behalf of the plaintiff was marked Defendant's Exhibit No. 2.)

By Mr. Houston:

Q. Now Mrs. Gorowitz, there are houses in the block not included in this picture?

A. Which ones?

Q. The one at the corner of Thirteenth and Euclid.

A. No, it is not in that picture.

Q. That is number 59, Lot No. 59 on Plaintiff's Exhibit No. 2, is not in the picture?

A. No sir.

Q. That is a very large house?

A. Yes sir, it is a boarding house.

Q. About how many rooms in it?

* Correct spelling Bogikes.

A. I never was in there; I don't know.

Q. In the neighborhood of fourteen rooms?

A. I have heard about fourteen rooms.

Q. Now, down below, the Borsk * house, that is next door to Mr. Huntley?

A. It is right next door to Mr. Huntley.

Q. Do you know how that house is used?

A. I don't know, no sir.

Q. Now, 2530, that is Lot 65?

A. That is Mr. Huntley.

Q. How is that house used?

A. They are attached to each other.

Q. You understand, Mrs. Gorowitz, I am not trying to confuse you, but, I want to get at the facts. Now, is that a rooming house at 2522?

A. I don't know.

Q. Have you ever heard it was?

A. No.

Q. 2520, is that a rooming house or an apartment?

A. That is an apartment.

Q. Have you ever been in there?

A. No sir.

Q. 2518?

A. That is Mr. Hill's

Q. Do you know whether there are any roomers in there?

A. No roomers, but little apartments.

Q. Have you ever been in there?

A. Yes sir, down stairs.

Q. Down stairs only?

A. Yes sir.

Q. 2516, is that where Mr. Hunter lives?

A. Yes, sir.

Q. Do they have roomers there?

A. Apartments, no roomers.

Q. Have you ever been in there?

A. Yes sir.

Q. 2514?

* Correct spelling Borowski.

- A. That is Mr. Pentleton.
- Q. They have apartments there?
- A. I guess they have three apartments.
- Q. Have you ever been in there?
- A. No sir.
- Q. On the corner there is a great big house?
- A. Yes sir.
- Q. That faces on Clifton Street?
- A. Yes sir.
- Q. That is Lot 51?
- A. It is right by the Central High School.
- Q. That is Lot 51?
- A. Yes sir.
- Q. What is that used for?
- A. I don't know, I have never been in there.
- Q. Going across the street, take the house on the corner?
- A. That is a big apartment.
- Q. On the corner of Clifton Street, there is a big apartment there?
- A. Yes, sir.
- Q. Have you ever been in there?
- A. I have not been in there, but I have seen the apartment.
- Q. It is called the High View Apartments?
- A. It is called the High View Apartments, and the other one has a different name.
- Q. The Costa Manor Apartments, next door to the High View Apartments, have you ever been in there?
- A. No sir.
- Q. The next house, 2523, what is that?
- A. That is a rooming house.
- Q. A great big old fashioned frame house?
- A. That is an old house.
- Q. Have you ever been in there?
- A. No sir.
- Q. And the next house, 2525, what is that?
- A. An apartment house.
- Q. Have you ever been in there?

A. No sir.

Q. That is Lot 129 on Plaintiff's Exhibit No. 2. Now, take 2523, that is an old frame building?

A. That is not a frame house. It is a nice house, it is a big nice house.

Q. It was a big old residence?

A. It was owned by a gentleman named Mr. Hammond, and they moved out, and for the past three years they put in a rooming house there. It was not a rooming house before that.

Q. But it is now?

A. Yes sir.

Q. It has been for the past three years?

A. Yes sir, I guess it is.

Q. Now, Lot 829, is that an apartment house too?

A. That is an apartment house too.

Q. Have you ever been in there?

A. No sir.

Q. Now, there are three single houses across the street. Have you been in them?

A. I have not been in the houses. There is one house that belongs to Captain Hedgwith.

Q. You have not been in this house?

A. No sir.

Q. Or the house on the corner?

A. No sir.

Q. Now, lets get back to this house (indicating). Who lives in this house?

A. Mr. Bagley and Mrs. Bagley * and her step-mother.

Q. Judge O'Toole's house, who lives there?

A. Mr. Jernegan, and they put in private apartments, one single room and kitchen.

Q. Now, the people that live there do not own it, that belongs to Judge O'Toole?

A. Yes sir.

Q. Now, the Huntley house comes in?

A. Yes sir.

* Correct spelling Bogikes.

Q. And your house?

A. Yes sir.

Q. No one lives in your house but your family?

A. No sir, just my married daughter, and my other daughter.

Q. Just your family?

A. Yes sir.

Q. Then comes the Fleet house next to you?

A. I don't know for the Fleets. I knew him for seven months as Preston. They came in by the name of Preston and that young boy started speaking to me, and I took action to find out what they were doing in that house, and they were supposed to be white people, and I asked the boy what are they doing there, and he said Mr. Preston bought the house and he was his uncle, and he said, "I am white," and I said, "no, you are not white, and I said, "it makes no difference, but what are you doing in the house," and he said they were cleaning up before they moved in, and he cleaned the windows on the porch and he said, "Mr. Preston is my uncle, and he is putting us in the basement, and the house will be occupied by a Government employee." the fact is, when they did move in they did move in a lot of young boys, but, they were funny people, colored people, terrible, and they talked such funny language, and it took seven months to find out who lived in that house, whether white or colored, such a mixture you could not tell, but, I saw it was the basement apartment they were in for a long time—

Q. Just a moment,—

A. and then I saw—

Q. (Interposing.) Just a moment, please, Mrs. Gorowitz. Please let me ask you a question. You saw Mr. Preston?

A. He came to my house.

Q. He was white?

A. He looked white.

Q. As a matter of fact you cannot tell when a person is white or colored?

A. I don't know whether he was white or colored, Mr. Preston.

Q. You didn't ask him?

A. He looked white; I never thought of asking him.

Q. How could you tell whether Mr. Preston was white or colored?

A. I can see it. I can say, Mr. Houston you are colored, and there are no white people over there (indicating) some may be white.

Mr. Houston: Will you ladies stand up. Some of them are white and some are colored.

Q. Now, will you tell me which are white and which are colored?

A. I can't tell but, it looks to me like they are all colored.

Q. They are all colored?

A. It looks to me like it.

Q. Do you want to come down and take a closer look?

A. I don't want to. I got good eyes. I guess I am not blind. I can see it.

Q. Now, Mrs. Gorowitz you found out there was a mistake about all of these houses being under the covenant?

A. I didn't find out there was such a mistake, only 2526. Still, they had the same. They didn't have the property covenant, but they had a covenant.

Q. You found out that house 2526, the Fleet house, did not have the covenant of 1910?

A. They had the covenant of 1928 or 1929.

Q. Will you please just answer the question. You found that there was no 1910 covenant on the Fleet house?

A. I just found it out recently.

Q. You didn't make any investigation of the neighborhood property when you moved in?

A. No, I didn't make any investigation, but, I asked my real estate man if these were strictly white people, and he said there were no colored homes from Colorado Road to Euclid.

Q. I am asking you whether you made any investigation

about the titles of those houses I showed you in the picture, did you make any investigation of any other house except your own?

A. I made an investigation when I bought, and I was sure everybody had the same thing.

Q. Would you have bought if you had found out that of the six houses that the one next to you did not have any restriction as to Negroes?

A. No sir, they could not have come in.

Q. You would not have bought?

A. No sir.

Q. That would have been cause in itself for you not to buy the house you are now in before you bought that house?

A. Yes sir.

Q. And you brought a suit against the people next door?

A. Yes sir, not only me—

Q. (Interposing) you brought a suit against them?

A. Yes sir.

Q. Is this suit entitled civil action 10551?

A. Yes sir.

Mr. Houston: I think Mr. Gilligan you will admit that?

Mr. Gilligan: Yes.

Q. You lost that case?

A. Yes sir, we lost that case.

Q. You never appealed it, did you?

A. No sir.

Q. Who helped you finance that case?

Mr. Gilligan: I do not know if that is competent.

The Court: She says she brought the suit and lost it.

Mr. Houston: I withdraw the question for I do not think I have laid the proper predicate.

By Mr. Houston:

Q. Now, the Negroes are still in there next to you?

A. You know it.

Q. You have had considerable trouble with these people?

A. They are still giving me trouble. They are giving me trouble every day.

Q. So those people have been objectionable to you as individuals?

A. Yes sir.

Q. You have not had any trouble with the Huntleys?

A. No sir, I don't bother with anybody.

Q. You have had no trouble with the Huntleys?

A. No sir.

Q. They have minded their own business, and so far as you know they have been respectable neighbors?

A. That is what you think.

Q. I asked you the question.

A. They are respectable people, yes, they are school-teachers. Mr. Huntley is a perfect gentleman, but, Mrs. Huntley I don't think so much of.

The Court: Just confine yourself to the question.

Mr. Gilligan: She should be allowed to answer the question.

The Court: I do not understand that she has answered the question as asked. Read the question and answer the witness gave.

(Thereupon the reporter read the question and answer as follows:

"Q. They have minded their own business, and so far as you know they have been respectable neighbors?

"A. That is what you think.")

By Mr. Houston:

Q. Why?

A. That is the answer I gave. I didn't think so much of her. She is noisy and spiteful, and I believe she helped the Fleets, and she gave them all the information about the last case, and I heard her speak to them in their house. I never saw Mr. Huntley mixing in.

Q. In other words, you do not like Mrs. Huntley?

A. I never spoke to her, never.

Q. Let me finish my question. You do not like Mrs. Huntley, and as she has never done anything to you, but you have seen her speaking to the Fleets?

A. She has annoyed me too.

Q. What did she do?

A. She has kept me up at nights.

Q. What did she do to keep you up at nights?

A. Laughing and carrying on around at one or two o'clock in the morning, and she has got a little pet, and her husband is a hard-working man, and our windows are close and we can hear everything.

Mr. Gilligan: I am inclined to object to all of this testimony. It should have some bearing on the issues here.

The Court: There is considerable leeway on cross-examination.

By Mr. Houston:

Q. When the Fleets moved into this house next door, did that change the character of the property so far as you were concerned.

A. It certainly changed it. The first thing when a colored person goes into a white block, the property goes down \$2,000.00 That is one objection.

Q. How do you know it goes down?

A. I know it for I have been told.

Q. Just because you have been told, and you have not learned that from experience?

A. No sir, I know it runs down the property.

Q. Who did you learn that from?

A. From the real estate people that I deal with. They talked to me, and they explained to me that it drops the property \$2,000.00 down.

Q. Did you learn that before you purchased your home or since.

A. No, it was recently, when the Fleets came in.

Q. When the Fleets came in?

A. Yes sir.

Q. And your objection is that when Negroes come in your property depreciates?

A. Exactly.

Q. Is that your only objection?

A. That is my first objection, and the second objection is we do not want to live next door to colored people.

Q. Suppose you cannot get the Fleets out?

A. I am still remaining in my home.

Q. You are still remaining in your home?

A. Yes sir, I have worked awfully hard and my husband is a sick man, and we have got to be there.

Q. Let me ask you this question, when a Negro comes into a neighborhood, do you consider it is no longer a white neighborhood?

A. It is hard to change from.

Q. I asked you the question, when a Negro comes into the neighborhood, like when the Fleets did, do you consider it is no longer a white group of homes?

A. I don't know. We are trying to make it to be white.

Q. Just answer my question, when Negroes move in, like the Fleet's moved in, does that white neighborhood cease so far as being a white neighborhood?

A. It is still white, only those two houses.

Q. That is not my question.

Mr. Gilligan: She has answered the question.

The Court: She was asked the question, when Negroes come in does that change the character of the neighborhood?

Mr. Gilligan: She has further said that it is a completely white neighborhood with the exception of these two houses occupied by colored people. She has also said that she is going to remain in her house.

By Mr. Houston:

Q. Now, what do you consider there, Mrs. Gorowitz?

A. I consider that neighborhood,—I would like to see that neighborhood remain as it is.

Q. What do you call the neighborhood?

A. I call it a suitable neighborhood.

Q. What do you call the neighborhood,—down to Florida Avenue?

A. I don't know where it goes around in what you call the neighborhood. I know this particular block right by Cen-

tral High School where 100 children go by my house that are strictly white.

Q. So you are talking about the block, is that right?

A. Yes sir, I don't want to know what is going on below or further up. I just wanted to remain where I am the way it is if I can.

Q. You mean by that, those six houses?

A. No, the whole city, or the whole block.

Q. Now, you also know—

A. I am for the whole block.

Q. You also know now there are no other covenants on the other houses?

A. I don't know. I don't know the other people's business. I don't know anything about across the street; I only know mine.

Q. You do not know anything about that?

A. I don't know.

Q. Now, there have been a lot of changes, and Negroes have come in, as you know, from Florida Avenue to Euclid?

A. No, Columbia Road to Euclid.

Q. Now, the neighborhood is practically colored from Columbia Road to Euclid?

A. There are still a number of whites in there.

Q. Will you please answer the question, there are a large number of Negroes that have come in?

A. I guess so; I don't know; I haven't looked into people's houses to see whether they are white or colored.

Q. You have answered the question. What is the nature of 13th Street right there; 13th Street is one of the thoroughfares for automobile traffic by your house?

A. The Street has been widened. The street has been widened. They have always had the same traffic for the past 14 years I have lived there. I have not seen any change.

Q. Now, coming to this suit,—you remember you made a complaint in the police court against Mr. Fleet?

A. Yes sir.

Q. Do you remember your testimony there?

Mr. Gilligan: I do not see that has anything to with this case.

The Court: I do not understand the purpose.

Mr. Houston: The purpose is to impeach her statement about the Huntleys, and it has a bearing on the question of her attitude towards the Huntleys.

The Court: How is that relevant to the issue here?

Mr. Houston: It is relevant on one of our defenses, that the matter of enforcement would be of no benefit to the plaintiff.

The Court: I exclude the question.

Mr. Houston: I will make tender of proof, if your Honor will permit me. I would prove that she testified in the police court to the effect that Mr. and Mrs. Huntley were perfect neighbors, and if the Fleets had been like the Huntleys, there would not have been any suit started, and she had absolutely no objection to the Huntleys. That is the tender, if your Honor please, and your Honor's ruling is that you exclude the proof.

The Court: Yes.

By Mr. Houston:

Q. Mrs. Gorowitz, if you were shown and it was proven to you that the moving in of Negroes into a neighborhood would not depreciate the value of your property, would that overcome one of your objections?

A. I do not understand.

Q. If you were shown that the moving in of Negroes would not depreciate the value of your property, would that remove one of your objections to Negroes?

A. No, indeed. I would still like to have my block white.

Mr. Houston: I have no further questions.

Redirect Examination

By Mr. Gilligan:

Q. Mrs. Gorowitz, you were asked regarding 2526 13th Street, and the action brought in that case?

A. Yes sir.

Q. And the statement was that it was lost. On what was that action based?

A. Against the Fleets?

Q. Yes.

A. Also on the covenant.

Q. What covenant?

A. 1928. The gentleman that sold that house to Mr. Preston, I forget his name,—Mr. Moore,—Mr. Moore sold that house to Mr. Preston.

Q. On what was the suit based?

A. The suit was based on the covenant.

Q. That is not the covenant in this case?

A. Not this covenant, but a second covenant.

Mr. Gilligan: I would like to offer in evidence the findings of the Court and judgment in that case.

Mr. Houston: I am going to introduce the whole case.

Mr. Crooks: Apparently the findings of fact and conclusions of law are not in the file. The judgment is, however.

Mr. Houston: I have no objection to the copy being read in.

The Court: Put the whole case in.

Mr. Gilligan: I would like to state that the covenant of 1928 was a restricted agreement entered into by the property owners on the block, and the restriction showed five houses not included in it. The reason for the dismissal of the suit was because the restrictive agreement contained a provision, and Justice Bailey held that the restrictive agreement was not binding on 2526 and for that reason dismissed the bill.

The Court: May I ask counsel, is this Fleet house No. 2526?

Mr. Gilligan: Yes sir.

The Court: That is part of the original tract that came down from 1910?

Mr. Houston: That is right.

Mr. Gilligan: It was the first house that was sold.

Mr. Houston: I was not going to make a statement until

I put on my evidence, but I think your Honor would get a better picture if I made a statement at this time.

The Court: I do not think it is necessary.

Mr. Gilligan: I merely brought this out at this time because of the inference in the questions asked.

That is all of this witness.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

Marian O. Bogikes

was called as a witness by and on behalf of the plaintiffs, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Gilligan:

Q. You are one of the plaintiffs in this case?

A. Yes sir.

Q. You and your husband own what property?

A. 2534.

Q. 13th Street, Northwest?

A. Yes sir.

Q. When did you and your husband buy that property?

A. In June, 1940.

Q. And you were shown the house by whom?

A. By an HOLC representative.

Q. Do you know his name?

A. Mr. Nice.

Q. Was anything at all said at that time when he showed you the house about the Negro question?

A. He said he had a chance to sell the house at \$2,000 more to a colored bishop, but he was not allowed to do it, for there was a covenant, and that was why we come in there and bought so we could settle down the rest of our lives and raise our children, and we bought the house, and a month later a colored family moved in down there.

Q. Were there any colored people there at the time you bought the property, or at the time you moved in?

A. No sir, there were not in that block or around the corner.

Q. Did you look around the community pretty generally?

A. My mother and I walked around to look at all the other houses. We were looking for a house, and looked at all the houses vacant, and they looked very nice, all the six houses looked so nice.

Q. Where was your deal for the house consummated, in whose office?

A. You mean completed?

Q. Yes.

A. It was consummated in the office of Mr. Jacobs. He is the lawyer for the HOLC, Mr. Harvey Jacobs.

Q. Was there anything said regarding the Negro question at that time?

A. We asked him again, and he said there was a covenant on it, and they searched the deed and we did not have.

Q. By the way, what is your color?

A. Strictly white.

Q. What is the color of your husband?

A. White.

Mr. Gilligan: That is all.

Cross-examination

By Mr. Houston:

Q. You did not make any inquiry about the title to the other houses.

A. No sir; Mr. Nice told me they were covenanted, that there was a covenant on the six houses, and they told us the apartment across the street was all white. You could see that.

Q. You found out later there was not this same covenant on the Fleet house?

A. Yes sir, later.

Q. And you were one of the persons who joined with Mrs. Gorowitz in the case against the Fleets which was lost?

A. That is right.

Q. And which has not been appealed?

A. That is right.

Q. If you had found out the Fleet house had no covenant on it, would you have bought?

A. I certainly would not have.

Q. So, it is the presence of the Fleets in the neighborhood, and the fact their house has no covenant on it that caused the trouble?

A. That is the truth.

Q. And, in your opinion, how many Negroes would it take to change the neighborhood; would one moving in change it?

A. If one moved in, there will be two, and then three and then four.

Q. My question is, if one moved in, would that change the neighborhood?

A. It starts the ball rolling.

Q. You know there is no legal way to get the Fleets out?

A. I don't know much about the law, but they said we could appeal the case.

Q. Assuming they are going to be there every day and are not going to move, you are still going to stay in the neighborhood with the Fleets?

A. I don't think so.

Q. As a matter of fact, you have no objection to colored families?

A. I do right now.

Q. Did you ever have a conversation with a Negro man when you discussed the proposal of selling colored?

A. One evening a friend of Mr. Huntley, Mr. Langford,* came and talked to me. He did not say out right, but I had an idea,—he gave me a price for the house, and I had an idea he wanted to strengthen the case by the making of a promise of my selling, but I did not give the price. The whole white neighborhood was in the case, and I was not going to sell my house.

Q. He offered you what?

A. He offered me \$10,000.

* Correct spelling Lankford.

Q. How much did that represent as an increase over the price you paid?

A. \$2,000.

Q. Now, didn't you tell him you wanted an extra \$1,000 and would not take his price?

A. No sir, I did not tell him that. I told him he very well knew we had this case coming up, and I said we would not hurt the others down there. So, if the worst comes to the worst we will sell.

Q. So, if the Fleets stay on there, you plan to get out?

A. I don't think the Fleets will stay there. They are too noisy,—I can't say the word.

Q. The point is, if they do stay there, you will get out?

A. They are not going to stay.

Q. Why do you know that?

A. Because the neighbors will not put up with it. They are too loud and noisy, even if they were white people.

Q. The point I am getting at—

The Court (interposing): Isn't that getting pretty far afield.

Mr. Houston: I do not think my question is far afield. My question of the witness was, is she going to stay in the neighborhood or get out. I think that goes to the merits of the case.

The Court: I will exclude the question.

Mr. Houston: All right, your Honor. Under our rules, we do not need to take an exception.

By Mr. Houston:

Q. Regarding the Huntleys, Mrs. Bogikes, you have no complaint against the Huntleys?

A. No, Mr. Huntley is very nice. He always says, "Good morning."

Q. And Mrs. Huntley?

A. I don't know her.

Q. You do not know anything out of the way about her?

A. No, they are very quiet people.

Q. Not to go over it in detail, but you have heard the

testimony of Mr. Gorowitz about the neighborhood. That is substantially correct, about the rooming houses and the apartment?

A. Yes sir.

Q. How many neighbors do you visit in the block?

Mr. Gilligan: I object to that kind of a question.

The Court: I will exclude it.

Mr. Houston: All right, your Honor. I shall not press it.

By Mr. Houston:

Q. Now, you spoke about the fact the property looked so nice when you came in the block to look at the property with the idea of buying. You saw the Huntley house at that time?

A. Yes sir.

Q. And the property the Huntleys now occupy looks just as nice as it did at that time?

A. Yes, sir.

Q. In other words, they have kept that property up in good shape?

A. Very nicely.

Q. So, with the exception of the standpoint of color, there is no objection so far as the Huntleys are concerned?

A. Yes; of course, if they stay, there will be others, and our property will depreciate. It always does.

Q. How do you know it always does?

A. I know myself. My mother has an apartment on Q Street, and the same thing happened there.

Q. Where is that?

A. On Q almost to 18th.

Q. 18th and Q?

A. Yes sir.

Q. You say that happened; do you have any other information about it?

A. This is the first house I ever bought. I have no other information.

Q. In other words, it is just feeling on your part?

A. Yes, sir.

Mr. Houston: That is all.

Mr. Gilligan: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon:

Patrick D. Holmes

was called as a witness for and on behalf of the plaintiffs, and being then and there duly sworn by the Clerk of the Court assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Gilligan:

Q. Mr. Holmes, you were the actual owner of the house, 2530 13th Street, Northwest, when it was sold to the Hundleys?

A. My son and myself.

Q. The property was put in your son's name?

A. Yes sir.

Q. You are here under subpoena?

A. Yes sir.

Q. And not a very willing witness?

A. I am willing enough. I got a summons, and I have got to come here. I take that back. I told you I would come without a summons.

Q. Then you are a willing witness?

A. Yes, you know that, don't you; you will acknowledge that.

The Court: I do not want counsel to indulge further in that inquiry. Proceed with the examination.

The Witness: Mr. Gilligan and I have been friends for years, and I told him—

The Court (interposing): We will not go into that.

By Mr. Gilligan:

A. Did you have any discussion with Mrs. Gorewitz before you sold to the Hundleys regarding 2530 13th Street?

A. Nothing definite at all. We talked on a few occasions.

Q. She has made the statement you told her you were

fixing it up and were going to live in there as your home?

A. I told her I considered that, yes.

Q. You did fix it up?

A. Yes sir.

Q. Did you have any conversation with Mr. Sparrel Wood, president of the Citizens Forum of Columbia Heights?

A. Yes, I did.

Q. Will you tell the discussion you had with him regarding this property?

A. Mr. Wood came to me and told me there was some covenant and I told him he was mistaken, there was not any covenant on it, and we had some conversation, that they would try to sell it or take it over.

Q. Did you give him a certain length of time to try to find a white purchaser?

A. Yes sir.

Q. Do you know how long that was?

A. I don't remember.

Q. Now, getting down to the Huntleys, did you have any discussion with the Huntleys regarding the fact there was a restrictive covenant with this deed?

A. I did.

Q. Just what did you say?

A. I told him there was a covenant in the deed.

Q. What kind of a covenant?

A. Against colored people; that is in writing in the contract.

Q. Just what is the writing?

A. I don't remember the exact words.

Q. Is that a copy of the contract? (Handing paper to witness.)

A. Yes sir.

Q. Just what is in there regarding the question of a restrictive covenant?

A. They would have five days to investigate the covenant before they signed, through the title company, and if they did not care to carry it through, I would refund their money.

Q. Anything else?

A. Yes, if they did carry it through, I was to be relieved of any obligation of any kind, or legal action of any kind.

Mr. Gilligan: I would like to offer this in evidence. It is a copy of the contract covering this property. I will offer this as Plaintiff's Exhibit 4.

(The said document so offered, was marked Plaintiff's Exhibit No. 4.)

Mr. Gilligan: I would like to read into the record a statement signed by Frederick Huntley, dated January 17, 1941, appearing in the contract of sale for the house, 2530 13th Street, Northwest:

"We hereby release the seller from any and all liability that may arise from the use and occupancy of the premises because of the covenant recorded against these premises, and waive our rights of any refund of the purchase price."

By Mr. Gilligan:

Q. Where was that put on?

A. At the title company. But the five day option was put on when they put up the deposit. They had five days to do the investigating.

Mr. Gilligan: I think that is all.

Cross-examination

By Mr. Houston:

Q. Why did you change your mind and decide not to use 2530 as your home?

A. I did not care to live next door to Mrs. Gorowitz.

Q. Not because Negroes were in the block?

A. No sir.

Q. Now, Mr. Holmes, you are familiar with the property that the Huntleys bought?

A. Yes sir.

Q. Have they depreciated or deteriorated the property by their occupation?

A. I should say not.

Q. What is your opinion as to their moving in, and what they have done so far as it affects the value of the property?

The Court: Are you qualifying Mr. Holmes as an expert?

Mr. Houston: I think I will qualify him.

The Court: Let's qualify him first.

By Mr. Houston:

Q. You are a licensed real estate broker in the District of Columbia?

A. Yes sir.

Q. You have been a licensed real estate broker how long?

A. I have been in the real estate business about 30 years.

Q. Have you also in the course of your real estate business had occasion to deal in property of the type the Huntleys have brought and which Mrs. Gorowitz occupied on 13th Street?

A. Yes sir.

Q. You have made sales and appraisals of property of that character?

A. Through that entire neighborhood, yes.

Q. Have your services been used by the Government as an appraiser of property in various proceedings?

A. No sir, but I have appeared against the Government in cases.

Q. But, you have been used as an expert in investigations and litigation?

A. Yes sir.

Mr. Houston: Do you admit that Mr. Holmes is a qualified real estate expert?

Mr. Gilligan: I think Mr. Holmes is a very excellent real estate dealer. He has done some things I would not do, but he is a very excellent real estate dealer.

Mr. Houston: You agree he is a real estate expert?

Mr. Gilligan: Yes.

By Mr. Houston:

Q. Mr. Holmes, will you give your expert opinion as to the effect of the Huntleys taking over the occupation and use of the real estate, considering the repairs they have made, as to either its depreciation or increase in value?

A. They have improved the property, at least to the extent

of \$1,500.00 or \$2,000.00. It is improved to that extent. I would not have obligated myself to do it for less than that.

Q. In comparison with the other five houses in the same row, how would you say the Huntley's house compares in appearance?

A. I have not inspected the interior of each of those houses, but, I would say they have got the best house in the row.

Mr. Houston: That is all.

Redirect Examination

By Mr. Gilligan:

Q. Now, Mr. Holmes, did you decide not to use this property as your home when you found out that 2526 13th Street was occupied by colored people?

A. I don't remember that.

Q. Did you tell that to Mrs. Gorowitz?

A. No sir.

Q. Would you like to buy Mrs. Gorowitz's home so that you might live next door to the Huntleys?

A. I would rather live next door to the Huntleys than Mrs. Gorowitz.

Q. That is not my question. If she paid \$13,000.00 for her property, and wanted to sell for \$10,000.00, would you pay that and live next to the Huntleys?

A. No, I would not pay that for it now.

Q. Does the moving in of colored people depreciate the value of price in the neighborhood?

A. That depends on the neighborhood. In that neighborhood the colored people have paid \$1,000.00 to \$3,000.00 more.

Q. That is the entire row?

A. Take Monroe Street, the people up there, the colored people paid in the whole block more than \$1,000.00 more.

Q. Did you sell all the houses up there?

A. No, but I know a good many sales that were made up there. I sold two.

Q. And you say all the houses are now occupied by colored people?

A. No sir, I did not say that.

Q. There are still many white people there?

A. Not any more between tenth and eleventh, and practically in the nine hundred block.

Q. As a matter of fact you would not want to live in the Huntley house because 2526 was occupied by the Fleets?

A. I tell you again I would rather live next door to the Huntleys than Mrs. Gorowitz.

Q. That is not the question. I am asking you, you would not have lived at 2530 because 2526 was occupied by the Fleets?

A. That wouldn't have stopped me.

Q. The fact that was occupied by colored people, that would not have stopped you?

A. The fact that there are one or two colored families in the block would not stop me at all.

Q. You just move into a property and sell it?

A. No. I am getting ready to move now.

Q. You have just moved in?

A. No.

Q. You lived on Franklin Street, and you are moving from there?

A. No, I am living at 1016 Douglas.

Q. You have moved a great many times?

A. Nine times in the last ten years.

Q. Have you always moved into neighborhoods where colored people were living?

A. I moved in on Twelfth Street where colored people are living.

Q. Were they living there then?

A. Yes, sir.

Q. How long did you stay there?

A. About two years.

Q. You move into a house and fix it up and then resell it?

A. Exactly.

Q. As a real estate man you move in to get a purchaser?

A. Exactly.

Q. You don't move in because colored people are living in the neighborhood?

A. No sir.

Q. Simply for the purpose of buying and selling?

A. Yes sir.

Mr. Gilligan: That is all.

Recross-examination

By Mr. Houston:

Q. And you do not move out because colored people are living there?

A. No, I do not.

Q. Mrs. Gorowitz has testified that in 1927 she bought her property for \$13,500.00. Assuming there were no Negroes in the block at all, would her property be worth \$13,500.00 today?

A. No sir, it would not be worth much more than \$6,500.00.

Q. As a matter of fact generally in 1927 there was an era of great inflation in real estate values?

A. Yes sir.

Q. So, in your opinion as a real estate operator, if Mrs. Gorowitz wanted to sell, and was not able to get \$13,500.00, it would not be because Negroes were in the block, and that they have depreciated the value of the property?

A. No sir.

Q. Mr. Holmes, in your opinion, or I should say in your experience as a real estate man, you have had occasion to become acquainted with the area from Clifton Street up to Park Road?

A. I have.

Q. Has there been a very rapid change in that neighborhood in the last ten years so far as Negro occupation?

A. Negroes occupy the area practically all the way to Park Road and Monroe Street.

Q. Has that change occurred in the last fifteen years?

A. It has.

Mr. Houston: That is all:

Redirect Examination

By Mr. Gilligan:

Q. You made a very definite statement that the whole neighborhood, with the exception of Clifton and Euclid Streets is occupied by colored. That goes up to where?

A. Up to Park Road and Monroe except Clifton and Euclid.

Q. You mean 13th Street is colored?

A. That is part of it on the east side, not all of it, no.

Q. Let's see how much you know. Take the block from Euclid to Fairmont, how many are there in there?

A. I don't know.

Q. And Fairmont to Girard?

A. That is 2700 or 2800.

Q. 2700?

A. I don't know. On the other side, the 3000 block, that is where I am.

Q. We are not up there. I will put it this way, all the cross streets except Clifton and Euclid?

A. They are not colored on the west side, no.

Q. The west side where?

A. But on the east side.

Q. Where?

A. In the 3000 block. They are all colored in the 2800 block.

Q. That is a pretty big block?

A. Yes sir.

Q. How many houses in that block?

A. I should have said the 2800 block has two.

Q. How many houses in the block where you say there are two?

A. I would say thirty. Clifton Street is all white and Euclid from 11th.

Q. Take Clifton Street from 11th?

A. That is white.

Q. To where?

A. 15th Street practically, 14th and over to 15th is all white, and I think there are two families on Girard. Most all of them are white.

Q. From Euclid Street all the way over?

A. That is white.

Q. So, as far as 13th Street and Clifton to the corner of this block from Clifton Street on up to about the 3000 block?

A. I think 13th Street is practically all white except two in the 2800 block. I think the rest are white.

Q. That is very much better. I thought you said they were practically all colored.

A. I was referring to the cross streets.

Q. Clifton Street is white?

A. Yes sir.

Q. And Euclid Street all the way to 15th from 11th?

A. Yes, from 15th.

Q. And Fairmont is colored from 11th to 13th Street?

A. I don't know about Fairmont exactly.

Q. Then take all the way up Girard and Columbia Road?

A. From 11th to 13th, yes.

Q. But not on the west side of 13th?

A. No sir.

By the Court:

Q. How about Clifton and 13th?

A. That is white.

Q. The Clifton Terrace is there?

A. Yes sir.

Q. That is white?

A. That is white.

Q. And the High View Apartments are there?

A. Yes sir, that is white.

Q. And the Castle Manor Apartments?

A. That is white.

Q. How many suites are there in the Castle Manor Apartments?

A. I don't know. It is a four or five story building.

Q. How about Clifton Terrace Apartments?

A. I just don't recall.

Q. It is a large building?

A. Yes sir.

The Court: That is all.

Mr. Gilligan: That is all.

Recross-examination

By Mr. Houston:

Q. I will ask you further, in your opinion the fact of the Hundleys' remaining in the block depreciates the value of the property in that block?

A. I don't think so.

Q. And the second question is, when you testified that all these people are white, you mean that as far as color is concerned that the people you know living in these apartment houses, the Castle Manor or the High View, that so far as appearances, there is no obvious appearance of them being colored or Negroes?

A. No sir.

Mr. Houston: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

Sparrel A. Wood

was called as a witness for and on behalf of the plaintiffs, and being then and there duly sworn by the Clerk of the Court assumed the witness stand and, upon examination, testified as follows:

Direct Examination

By Mr. Gilligan:

Q. Mr. Wood, what is your position in connection with the Citizens Forum of Columbia Heights?

A. I am President.

A. What area does that forum serve?

A. It serves 13th Street between Lamont and Columbia Road.

Q. Are you familiar with the situation in the 2500 block on 13th Street with regard to colored people?

A. Very well.

Q. Will you tell his Honor just what passed between you and Mr. Holmes in connection with the 2500 block on 13th Street?

A. I got in touch with Mr. P. D. Holmes on the 10th day of January this year. I am wondering, Mr. Gilligan, if I may state to the court why I thought it was necessary at that time.

Q. You make your statement to the court.

A. Knowing, as I did as Chairman of the Property Protection Committee that 2530 was not under the certain agreement signed in 1928, and that 2526 at that time was occupied by colored persons, which house was under the agreement, the agreement being that no signer should sell or rent to colored, and those who did sign the covenant at that time would be released from their obligations, I thought at once of 2530 which was not under the citizens agreement, and that could be sold to colored and that of itself would break the covenant on 2526. I knew also at that time the citizens were cooperating with me to try to get house No. 2526 back into white possession. I was informed by the owners of property in the 2500 block on 13th street—

Mr. Houston: I object to what the owners of the property informed him.

Mr. Gilligan: This is just preliminary.

Mr. Houston: Well, let it go in.

The Witness: Being informed by the owners of the property in the 2500 block that Mr. P. D. Holmes was showing the property No. 2530, to colored persons, I immediately got in touch with Mr. Holmes by phone on January 10, 1941, telling him I understood he had bought the property,

and was showing it at that time to colored people, offering it for sale or rental, or both. Mr. Holmes said he had bought the property and was showing it to colored people. I told Mr. Holmes that at that time plans were being made in order to get 2526 back into white possession, and told him how important 2530 would be for the citizens agreement, and for that property not to fall into the hands of colored persons. He said, "Mr. Wood, how long do you think it would take the citizens on the block to get 2526 back into the hands of white persons? I said that would be merely an opinion, but we did want time. He said, "I will give you sixty days," and I thanked him. I immediately went back, and I had been called in on a number of occasions in these block meetings at Mrs. Gorowitz's home. I immediately went back and informed the owners of the property on that block that Mr. Holmes had told me he would give me sixty days for the proper arrangements to be made, and 2526 to go back to white ownership.

That would bring it to March 10. On Monday, January 21, I was informed that colored persons by the name of Mr. and Mrs. Huntley had moved into the property, 2530. I immediately got in touch with Mr. Holmes over the 'phone, and told him what I had heard, that colored people had moved into the property, and I presumed had bought the property, and called his attention to the promise to give me or the committee on the block 60 days in which to devise plans to get this property back in to the hands of white owners. He remembered the promise, but, he said, "Mr. Wood, I will be frank with you, I bought the property originally for the use of my own family, but when I heard the house 2526 was occupied by colored people, I felt that would not be a desirable home for my family, and I could not carry out my promise, so I have sold it to colored people.

Before this time I had advised the people on the block, as the head of the Citizens Forum and head of the Property Protection Committee, that I believed the best plan would be to appoint a committee to see Mr. and Mrs. Huntley, who

were the purchasers from Mr. Holmes of this property, and see if arrangements could be made by which they would be willing to dispose of that property to white purchasers. Plans were being made to that effect when I thought it would be a good plan for me to go to see Mr. Holmes at his office on Franklin Street, Northeast. I did that, and I took with me Mr. C. H. Russell, who has known Mr. Holmes for a number of years. Mr. Russell and I went to see Mr. Holmes at his office between January 22nd and January 29th. I do not know what day of the week that was, but it was between those dates. We wanted to know from him,—I was the spokesman for Mr. Russell was not vitally interested in that property,—I wanted to know if there was an arrangement or any plan by which he could use the good offices of his real estate firms to make arrangement with Mr. and Mrs. Hundley by which the property at 2530 could be passed back into the hands of white people, and so save the citizens covenant.

Mr. Holmes told me he would do what he could do. But, in the course of that conversation he said, "Mr. Wood, I do not believe very much in this covenant," and he said, "Do you know there is a covenant on 2530, that is, a deed covenant on 2530, and if you want to know about it, I will give it to you,—I will give you the case number at the District Title Company." That being news to me, I thanked him and took the case number.

I went back home and then went to the District Title Company and called for this case number, and I was showed what is called a deed covenant on the property, as I remember, not to sell, rent or otherwise allow to be occupied by colored persons or people of the colored race under a fine or penalty of \$2,000, as I recall it. Having been informed this was on the deed on this property, I as the head of the Citizens Forum, called another meeting to be held on the 29th of January, 1941 at the home of Mrs. Gorowitz. I went to that meeting and as head of our property protective committee, I opened the meeting and informed the owners

of property who were there, that I had learned two or three days before that, that there was a deed covenant on the property 2530, and advised them at that time that I thought it would be the best thing for them to employ a lawyer and bring suit before the Court on the deed covenant on Property 2530. They said they thought I was right, and I mentioned Mr. Gilligan. I said I thought he would be the proper one to bring that suit.

Mr. Gilligan: You need not mention me.

The Witness: Mr. Gilligan was employed, and they proceeded on this claim. That is all I know about the case and the covenant.

By Mr. Gilligan:

Q. Do you know anything about the effort made in connection with 2526 from the time these people moved in?

A. I think I know a good deal about it.

Q. Will you tell his Honor briefly,—(The reason I ask that question, your Honor, is that our good friend said there was laches, and Judge Bailey said there was no laches.)

The Court: The record speaks for itself, and it will save time to refer to the record.

Q. Are you familiar with the question of the occupancy of the houses in your territory,—by the way, what does that territory cover?

A. The territory of the Citizens Forum?

Q. Yes, the Citizens Forum.

A. South to Clifton Street, and 14th Street; down as far as Belmont, over to 16th Street, to Shepherd, and then to Georgia Avenue, and down Georgia Avenue to Euclid, and then to Clifton Street.

Q. So, it includes all of this territory on 13th Street?

A. Yes sir.

Q. Will you tell his Honor about the occupancy from Florida Avenue north?

A. Beginning with Florida Avenue, there is no residential property. Beginning on Belmont there is quite a large

apartment house occupied by white persons, and when you get further on, there is Clifton Street, and you have on the eastern end a very large apartment house, known as Clifton Terrace.

Q. How is that occupied?

A. Occupied by white persons.

Q. Tell his Honor about the Central High School.

A. That is south of Clifton Street, between 11th and 13th. It is one of the white high schools of Washington, and has about 3,000 students.

Q. All right.

A. What was your question.

Q. Begin on 11th Street.

A. Between Clifton Street and Euclid there are two colored persons, namely, 2526 and 2530 on 13th Street, and all the rest, including the large apartment houses are occupied by white people.

Q. How large are those apartment houses?

A. There are two large apartment houses, one known as the High View, next to Clifton Street, a five story high building, and it is quite a large apartment building. I would not say how many persons occupy it. Then, next to that is the Castle Manor, the same size and occupied by white people.

Q. Now, go on north on 13th Street.

A. There is a smaller apartment in that same block known as 2535,—I do not believe it has any name, occupied by white people. Probably there are 200 or 300 people in that building. All the other buildings on the east side to Euclid are white.

Q. Now, between there and Fairmont?

By the Court (interposing):

Q. You said I understood you all the other buildings from 2535 were occupied by white people?

A. Yes sir; 2535 is this apartment house occupied by white persons.

Q. How about 2529?

A. That is occupied by white persons.

Q. And 2543?

A. Occupied by white people.

Q. How about this large frame rooming house at 2523?

A. I can tell you something that happened there recently.

Q. It is occupied by white people?

A. It is occupied now by white persons, yes sir.

Q. Now, from Euclid to Fairmont on 13th Street?

A. It is solidly white.

Q. From Fairmont to Gerard?

A. Solid white.

Q. Gerard to Lamont?

A. On the east side of the street, all colored, except two families there.

Q. How about the west side?

A. On the west side there are some colored in the 2800 block on 13th Street.

Q. What is the number of the block?

A. I do not know the number of the block, but it is between Gerard and Harvard Streets. The block between Harvard and Columbia is the block in which I live. It is all right except one family at the south east corner of 13th Street and Columbia Road. That is colored. That block has a covenant agreement. There is no provision by which if a non signer sells to colored it releases the signers of the obligation. Everybody except one citizen signed that covenant back in 1928, I believe. So, one family lives there. Then the block known as the Irving block is mostly all colored. There are four white families living on the west side.

Q. Take the side streets from 11th and as far as you want to go; take Clifton Street?

A. That is solidly white.

Q. How far?

A. All the way to 14th.

Q. How about Euclid Street between 13th and as far as it goes to 16th?

A. That is solidly white.

Q. There is a large apartment house on Clifton and Euclid that you testified about?

A. Yes, a good sized apartment between 13th and 14th.

By the Court:

Q. The students of the Central High School, do they come from that immediate neighborhood, or from all over the city?

Mr. Gilligan: I think Mr. Houston and I can both answer that. We were both on the School Board, and they come in a large part from that community.

Mr. Houston: It is also true that in the last five years there has been discussion about turning the Central High School over to colored. Central High students come from that area, but they come from a wide area. South of Central High, all the people are colored, and that was one of the reasons for the discussion as to turning it over for colored students.

The Court: You mean the next block over?

Mr. Houston: Yes sir. If your Honor knows the community, 13th at Florida Avenue starts up the hill, and they are all negroes on the east of Central High. There is the Garfield Hospital on the east side of 11th, and they are all Negroes in there.

The Court: I would like to suggest to counsel that you submit for the consideration of the Court a stipulation and map taking in this whole area. It will be very helpful. Mark out on the map what is white and what is colored.

Mr. Gilligan: That is all.

Cross-examination

By Mr. Houston:

Q. How long have you been in Washington?

A. I have been here since 1919.

Q. You came here from where?

A. I moved from Alexandria here.

Q. Just in order to identify yourself, where were you born?

A. I was born in Floyd County, Virginia.

Q. You have lived in this area of Columbia Heights how long?

A. I have lived at 2913 13th Street since 1924.

Q. Since you came to live in that area, you know that there is a large area now occupied by Negroes that was all occupied by white at the time you came there, and there has been a great change in the character of the residents?

A. There has been a great change on the side streets east of 13th Street, and if you will allow me I will give the reason for it.

The Court: You may give the reason.

The Witness: For the reason that there were no restrictive covenants. For instance, in this Columbia Heights area where we are, we have succeeded, in the section where we are. We did not start work there until 1930. Before that time colored persons had begun to come in on the east side of 13th Street on those side streets with the exception of Clifton and Euclid, but when it came to Fairmont, Gerard, Harvard and Irving and Kenyon, they had gotten in, and we could not get the covenant.

Q. How many Negroes does it take to spoil a neighborhood so far as the whites are concerned?

A. I have an opinion if the Court wants me to give it.

Q. I think it is material.

The Court: I do not think so.

Mr. Houston: Your Honor allows me an exception on that?

The Court: Yes.

By Mr. Houston:

Q. You have not moved out of your own block due to the presence of a Negro family in the block?

A. Certainly not.

Q. Now, coming down to 2526, you were instrumental in getting the case brought against the Fleets and the Hundleys?

A. Just purely my advice. Not being a property owner

on the block I had nothing to do with it except in an advisory capacity, and I was merely called in in such capacity.

Q. And when you told them about the covenant on 2530, nobody knew about that?

A. I did not know there was a deed covenant until Mr. Holmes told me in January. He did not think much of it.

Q. So, nobody else knew about the deed covenant until you told them about it at Mrs. Gorewitz's house?

A. No sir.

Q. Mrs. Gorewitz never told you about that deed covenant on 2530?

A. No, she did not tell about the deed covenant, but the restrictive covenant.

Q. Mrs. Gorewitz told you she moved in there in 1924, and that restrictive covenant was not on there then, but it was put there later?

A. I do not know when she moved in.

Q. That is a matter of record. Now, as to the Fleet property, 2526, there is no way, so far as your study of the case, and your consultations with Mr. Gilligan, to get the Fleets out by legal means now?

A. There is not any way to get them out by legal means? That would be merely an opinion. I would not know.

The Court: That is not material.

Mr. Gilligan: I would not mind him answering.

By Mr. Houston:

Q. Now, let me get down to the meat of the thing, and that is this: Assuming the Fleets are in the neighborhood, and cannot be removed, is there any further action the Citizens Association is going to take,—suppose they will not sell?

A. Mr. Houston, I want you to understand that the Citizens Association has not brought action in this case. The Citizens on the block are bringing the suit. It is not the Citizens Association. As head of their committee, I have advised them to do so, but I am not a plaintiff in this case.

Q. I understand, but you did go around and raised a lot of money.

The Court: We are wasting a lot of time.

Mr. Houston: At the same time I want to develop this question about the occupancy of 2526. I think that is quite material.

The Court: Well, the Fleets are in.

The Witness: Would your Honor like to know my first connection with the 2526 case?

The Court: No.

Mr. Houston: It stops there, and I leave it there. The Fleets are in and not out.

By Mr. Houston:

Q. There are some Negroes on the side streets west of 13th Street?

A. On Gerard Street there are.

Q. And also on Harvard?

A. No, absolutely not.

Q. That is so far as you know?

A. No, they have been in my office, and they are 100 per cent signers.

Mr. Houston: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Gilligan: Your Honor, is it the understanding there is no laches as to 2530?

The Court: The record speaks for itself.

Mr. Gilligan: The plaintiff rests.

Mr. Houston: I will call Mr. Ring.

Thereupon

James Ring

was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand, and, upon examination testified as follows:

Direct examination

By Mr. Houston:

Q. Mr. Ring, you are Administrative Officer with the Alley Dwelling Authority?

A. Yes sir.

Q. You are here under subpoena?

A. Yes sir.

Q. Will you give the Court a picture of the rate of growth in the population in the District of Columbia so far as races are concerned, and will you state to the Court the situation so far as housing in the District is concerned?

A. (Exhibiting chart.) That is rather a large order. So far as the growth of the population by races is concerned, I would imagine the Bureau of the Census would have more accurate information on that.

Q. What is your study in the Alley Dwelling Authority, so far as it applies to housing?

A. So far as housing is concerned, the Alley Dwelling Authority has determined, on the basis of facts that there has been a shortage of housing for families of low income for a very long period in Washington. There was a brief period before the World War, but, for a long time there has been a severe housing shortage.

Q. May I ask, does that apply to both whites and Negroes equally, or is it greater so far as Negroes are concerned?

A. It applies to whites and to colored equally, that is, as to families of low income. Of course, it is a matter of common knowledge that there is a larger number of families of low income in the Negro race in the District of Columbia.

Mr. Crooks: I am afraid we will have to object to this line of questioning. So far we have refrained from objecting, thinking something would be developed, but I do not see any connection between low cost dwellings and the property on 13th Street of the value of between \$10,000 and \$20,000.

The Court: Counsel will have an opportunity to connect it up.

Mr. Houston: I want to prove by several witnesses, starting with Mr. Ring of the Alley Dwelling Authority the situation as to housing shortage for any income group, and I want to prove, second, I want to prove that there practically has been no expansion in the Negro residential areas in proportion to the amount of growth. I want to prove that the Alley Dwelling Authority did not provide any increased facilities, but simply a program of construction. Not only that, but I want to prove by reason of the fact the Government building program has taken away large areas of property heretofore occupied by Negroes, that it has forced Negroes to go to other areas. I will show also the change in the operation of the economic laws of the city, and that due to the growth of the population, that the Negro population is coming right straight up 13th Street, covenant or no covenant.

The Court: The Court will take judicial notice of the facts as to the change in the housing problems in Washington, and that applies to both whites and Negroes.

Mr. Houston: Will your Honor also take judicial knowledge of the fact that certain areas were covenanted in the northwest—

Mr. Crooks: I do not believe the Court can take judicial knowledge of the fact certain areas have covenants.

The Court: The Court will take judicial knowledge of the facts as expressed by the Court, but not as expressed by counsel. Now, confine yourself to this particular area.

Mr. Houston: I will, your Honor, but we must also get in the proposition about the change in the neighborhood, and how it is changing.

The Court: Counsel has agreed to submit the Court a map of the general area, and it will show the facts you want to prove.

Mr. Houston: It will show the static proof, but will your Honor allow me to go further and show the reason for the change.

Mr. Crooks: Your Honor, our position is that we are

seeking to enforce a covenant on this land. We have indicated to the Court that we are willing to submit a map showing the white and Negro situation in the surrounding territory. We feel beyond that, that as to the questions Mr. Houston has indicated, that it has no bearing on this case. Now, a gentleman from the Alley Dwelling Authority cannot say whether or not Mrs. Gorewitz or some one else is entitled to enforce a covenant as to a house at 2530 13th Street. That is our position, and we do not feel that we should go into the social aspects of this problem.

Mr. Houston: In submitting our case we have got to show the change and to the extent the change operates directly on this property. We will show for instance they could not get 100 per cent signers on this 2500 block. I was laying my foundation. I am perfectly willing to stop that line of examination at this point, but I believe we should show the dynamic force that caused the change.

The Court: The Court will confine counsel to the facts involved in this particular action.

Mr. Houston: The only thing I can do is to make my tender. I should tender here the population figures and the census rise in the District of Columbia. I have some testimony I am going to offer as to that particular matter. I have Dr. Frasier, who has made a study of this area, and I take it, your Honor, will take judicial knowledge of any Government records. I would like to offer them now at this time as Defendants' exhibit No. 1.

I should like also to call attention to the case of Gorewitz vs. Preston as showing the background of this case. Now, if your Honor please, this covenant agreement was dated in 1910, and Mr. Wood has just indicated something about a certain agreement whereby they attempted to bind the owners on the square not to sell to Negroes. I wish to read it.

The Court: The Court is interested in the deed with respect to the Fleet property. That property also came down from this original development in 1910?

Mr. Houston: That is right.

The Court: That was a covenant presumably running with the land.

Mr. Houston: No, there was no covenant running with the land on that particular property. The stipulation shows there were six pieces of property, of which the Fleet property was the first one sold. That property has no covenant against it.

The Court: But with respect to 2524, 2528, and 2530.

Mr. Houston: There covenants there.

The Court: How about 2514 and 2516?

Mr. Houston: No, except they did attempt to put in a restrictive agreement, and that restrictive agreement was the agreement under which the case was brought against the Fleet house, and that was the case that was lost. I take it your Honor will let me read the covenant?

The Court: That case is already in evidence.

Mr. Houston: Yes sir. It is stipulated that they were not able to get 100 percent of the owners to sign that restrictive agreement. So, you have a situation at the present time where there are only five houses in the block that have that restrictive agreement, and that restrictive agreement is not binding, and has no binding force for the reason that it has been judicially determined so far as the plaintiffs are concerned that the 1928 agreement is not binding.

The Court: The record is offered in evidence, and the Court will read the record.

Mr. Crooks: We object to defendants' exhibit No. 1.

The Court: The Court will receive it.

Mr. Houston: That is all Mr. Ring.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

Mary G. Hundley

was called as a witness for and on behalf of the defendants and being then and there duly sworn by the Clerk of the Court, assumed the witness stand, and, upon examination testified as follows:

Direct Examination

By Mr. Houston:

Q. State your full name?

A. Mary G. Hundley.

Q. And your address?

A. 2530 Thirteenth Street, Northwest.

Q. What is your occupation?

A. Teacher of French.

Q. Will you please state your education?

A. I was educated in the public schools of Washington, and then I went to Radcliff College where I took a Bachelor's degree and I got my Master's degree at Middleboro.

Q. Your salary in the public school is what?

A. \$3200 a year.

Q. Coming down now to the purchase of your home, when did you go in?

A. January 18, 1941.

Q. You have lived next door to Mrs. Gorewitz ever since?

A. Yes sir.

Q. You heard Mrs. Gorewitz's testimony?

A. Yes sir.

Q. You know Mrs. Gorewitz?

A. I have not had a chance to say anything to her. When I moved in the house the agent told me she was hostile. I was hoping to make friends for I had a number of Jewish friends, but I never had a chance.

Q. Have you knowingly disturbed her?

A. On the contrary I have always retired before midnight, and as to telephoning I have been decidedly restricted in the use of the phone, for we were annoyed by malicious calls from the time we moved in, and I was forced to change to an unlisted phone, and therefore I have only had calls from business friends.

Q. What improvements have you put in since you bought the property?

A. After we moved in we put in a complete modern bath

and we put in three French doors, and we have made numerous other improvements.

Q. In the beginning what was it?

A. In the beginning it was about \$1500, and since then we have put in other improvements, and it is altogether \$2200 and \$2500.

Q. Now, Mrs. Hundley, for the sake of the record, you are colored?

A. Yes.

Q. Let me ask you this, has your entire family been colored?

A. They have been listed as colored but, some of my family could have been listed as white, and could have worked to better advantage and have gotten more money.

Q. In your own personal experience, have you been advised not to say you are colored?

A. Yes sir, in my work at Middleboro, it was necessary to use the dormitory, and it was my desire to get proficient in French. The officials knew what I was. I never felt it was necessary to hide it, and at Radcliff I was advised not to mention it so it was not really known among the students.

Q. Are you acquainted with several persons in Washington who could not be identified as Negroes?

A. Yes sir, we have any number of friends.

The Court: How is that material?

Mr. Houston: Mrs. Hundley admits that she is colored, and we can show that as to 2526 a Negro did buy it, and was taken for white.

The Court: I do not think that is helpful to the Court to pursue that line of questions.

Mr. Houston: Again, your Honor, we will make the tender. We can show many cases, and we make the tender now. It has been shown that Mrs. Gorewitz was mistaken about two of the ladies who stood up, and said that they were white, and for that reason I think we should have this in the record, and if your Honor wishes to rule it out, of course your Honor will allow us an exception.

The Court: I will exclude it.

By Mr. Houston:

Q. Mrs. Hundley, I will ask you to look at the pictures here that are part of the record, and I will ask you if these are pictures of the interior of your home.

A. Yes sir.

Mr. Crooks: We have no objection to this picture.

Q. Now Mrs. Hundley, have you purchased this property as a permanent home?

A. Yes sir.

Q. And have you conformed to all the best standards of the neighborhood?

A. I believe so. I have lived in similar neighborhoods before.

Q. And it is your intention to continue to reside there?

A. Yes sir, I cannot find any other place.

By the Court:

Q. Where did you live before that?

A. I went there from an apartment. When I was speaking of similar neighborhoods, I was thinking of 17th and P. I was reared there in my grandmother's home.

Q. Where was the apartment where you lived?

A. Howard Manor.

Q. Is Howard Manor a colored apartment?

A. Yes sir, and we needed more room. We had two rooms a kitchen and bath.

Mr. Houston: That is all.

Mr. Crooks: There will be no questions.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

Frederick Hundley

was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and upon examination, testified as follows:

Direct Examination

By Mr. Houston:

Q. What is your name?

A. Frederick Hundley.

Q. What is your occupation?

A. School teacher.

Q. Mr. Hundley, did you and Mrs. Hundley make an effort to find another house suitable to your station in life?

Mr. Crooks: We will have to object to that line of questioning. What they did before is only again pursuing this social question.

The Court: I will admit the testimony.

A. We had been looking around for a place, but had not succeeded in finding one, that was suitable. We thought of Brookland but we did not wish to go out there.

By Mr. Houston:

Q. That is how far away from the Howard Manor where you were living?

A. I suppose four or five miles.

Q. And was it closer to Mrs. Hundley's work?

A. It would be much further.

Mr. Houston: I should like also to make this same tender so that the record will show as to Mr. Hundley's salary.

The Court: I will exclude it.

Mr. Houston: I would like also to ask a question of the witness as to his own experience with Negro students who have gone through the high school with him in the District, as having gone across the line.

The Court: I will exclude that. Will counsel come to the bench.

(Thereupon counsel and the Court conferred at the bench which the Court directed the reporter not to take down.)

The Court: We will recess now until 1:30.

(Thereupon at 12:30 o'clock P. M. a recess was taken in the above entitled cause until 1:30 o'clock P. M.)

After Recess

The hearing of the above entitled cause was resumed at 1:30 P. M. whereupon the following proceedings were had:

Mr. Houston: There are a couple of tenders I would like to make at this time. I want to tender two of the witnesses who stood up to be identified, and were identified as white by Mrs. Gorewitz.

The Court: Do they live in the block?

Mr. Houston: No. Does your Honor exclude that?

The Court: That is excluded.

Mr. Houston: Second, it is known to the plaintiffs and to Mr. Gilligan that there is no covenant in this block on the Clifton Street side. Your Honor will remember that Mr. Wood testified that the block was covenanted on Euclid and Clifton. There was an agreement made on the 10th day of September, 1926, and recorded on the 30th day of September covering all property on Euclid on both sides between 13th and 14th except the premises 1357 Euclid Street to run for 21 years from date, and it will expire on the 10th day of September, 1947.

Mr. Gilligan: There is a covenant also on Clifton Street between 11th and 13th Streets.

Mr. Houston: His Honor mentioned this square, and there is no covenant on this square, and I say that with opportunity of counsel to check it.

The third thing I would like to do is to tender at this time the chain of title of Lot 77. The point there is that the title comes to the Hundleys from the Home Owners Loan Corporation. May I ask that it be turned over to the reporter so that it can be spread on the record. Again, I am tendering it subject to the right of counsel to inspect it, and to make any corrections they may find.

The said chain of title is as follows:

Chain of Title to Lot 77

1. *Deed* Harry B. Wilson and Harry Wardman, dated September 29, 1910, recorded October 4, 1910 (Liber 3364,

f. 214) to William A Folger and Rebekah Folger his wife (covenant set out in full)

2. *Deed* William A. Folger and wife dated November 24, 1924, recorded December 17, 1924 (Liber 5410, f. 198) to Nelly M. Purcell. (Subject to covenants of record).

3. *Deed in trust* Nelly M. Purcell dated Mar. 15, 1934, recorded Mar. 15, 1934 (Liber 6783, f. 299) to Charles A. Jones and Paul J. Frizzell trustees to secure HOLC \$7,-383.53.

(No mention of covenants)

4. *Trustees deed* Charles A. Jones and Paul J. Frizzell trustees, dated November 13, 1940, recorded Nov. 19, 1940 (Liber 7546, f. 571) following auction sale Nov. 12, 1940, upon default under deed in trust *supra*, to Home Owners Loan Corporation \$6,500.00.

(No recital that deed is subject to covenants of record.)

5. *Deed* Home Owners Loan Corporation dated Dec. 23, 1940, recorded Jan 13, 1941 (Liber 7567 f. 333) to Nelson D. Holmes.

(No covenant)

6. *Deed* Nelson D. Holmes dated Jan. 17, 1941, recorded Jan. 23, 1941 (Liber 7571 f. 328) to Frederick F. Hundley and Mary G. Hundley.

(Subject to covenants of record)

By Mr. Houston:

Q. Mr. Hundley, were you advised anything by Mr. Langford, acting as your agent and counsel at the time of the purchase and sale about the validity of the covenant?

A. No, we were never told of any covenant of 1910.

Q. I am talking about when you signed the agreement not to hold Mr. Holmes, if there should be any trouble under the covenant; what did Mr. Langford tell you about the covenant in his opinion?

A. He said that the covenant should not have been placed on the agreement.

Q. What did he say about it being valid or invalid in his opinion.

The Court: That is on the theory of representations made to the purchaser?

Mr. Houston: Yes.

The Court: That is admitted.

A. He said it was invalid.

Mr. Houston:

Q. Had any action been taken against the Fleets at the time you purchased your property?

A. Not as I know of. In fact, I don't think there was any.

Q. What if any effect did the fact that the Fleets were on the premises living in their house have on you in the matter of your decision to buy?

A. Well, it had a great deal. We figured if one colored family moved in the block, and remained as long as they had without any interruption, we were perfectly safe in moving into the property.

Mr. Houston: Take the witness.

Cross-examination

By Mr. Crooks:

Q. Mr. Hundley, you stated Mr. Lankford discussed this matter of the covenant with you before the contract was signed, is that correct?

A. Yes sir.

Q. How long before?

A. Not more than a few days, about a week.

Q. Who was instrumental in getting you to be interested in this house?

A. Mr. Lankford.

Q. And in connection with the purchase of that property he told you that this covenant in his estimation was not valid?

A. It would not hold true. He gave us the impression it was the 1928 covenant and could not be valid.

Q. The agreement of 1928?

A. We did not have any knowledge of the 1910 covenant at all.

Q. Did you know, or were you told there was any covenant on the Fleet home, 2526?

A. No sir.

Q. Did Mr. Lankford say anything to you about that?

A. No sir.

Q. Did you say anything about whether the Fleets were Negroes living in 2526?

A. Yes sir, we knew that before.

Q. Did you inquire as to whether or not the Fleets were the owners of the property?

A. Yes sir, we knew they were.

Q. Who told you?

A. Well, they told us.

Q. When did you move into the property, Mr. Hundley?

A. In January.

Q. About what date, do you recall?

A. On the 17th I guess.

Q. You made certain repairs prior to moving in?

A. No, we did not make any repairs until we moved in. The house was in excellent condition, but we made extensive repairs after we moved in, and the suit was not brought until we had spent an enormous sum to put it in shape.

Q. What do you mean by an enormous sum of money?

A. Around \$2300.00.

Q. You estimate that the amount you spent on the property up to the time this suit was filed was \$2300.00?

A. Between \$2300.00 and \$2400.00.

Q. Did you have any conversations with Mr. Holmes in connection with this property?

A. Sure, before purchasing it.

Q. Did he say anything about the covenant?

A. Yes, he said in the beginning if any trouble came up about the covenant, our money would be refunded, that is, the initial payment.

Q. And it was on the basis of Mr. Lankford's judgment that you bought the property?

A. Yes sir, as an attorney he took it that way. He is an attorney.

Q. And in the real estate business also?

A. Yes sir.

By The Court:

Q. Did you consult him as a real estate man or as an attorney?

A. As a real estate man.

By Mr. Crooks:

Q. You and your wife did sign that statement to save Mr. Holmes from any damages?

A. Yes sir, but that was placed on afterwards. There are two agreements there. He put the second one on when we got it from the title company.

Q. This statement up above in type was that on there at the time you signed the agreement on January 11?

A. As I remember it was not.

Q. That is on the right hand side of the back of plaintiffs' exhibit 4, being the sales contract?

A. Yes sir.

Q. When was that put on there?

A. In the title company's office.

Q. On the same date as the writing on the left hand side?

A. Yes sir.

Q. And on the left hand side is the date January 17, when was that put on there?

A. That was put on there in the house, 2530.

Q. Mr. Hundley, you and your wife, in spite of the fact that there might be some question about this covenant and its validity, you two proceeded to spend approximately \$2500.00 in making the repairs on the house, and fixing it up the way you wanted it?

A. Certainly, for we wanted to disprove the fact we would let the property run down. We tried in every way to make it more attractive and worth living in.

Mr. Crooks: That is all.

Redirect Examination

By Mr. Houston:

Q. Mr. Hundley, did you have any complaint prior to the letter you received in March from Mr. Gilligan advising you that you had violated what he considered to be the law in occupying that property,—had you had any complaint or objection from anyone else?

A. No sir.

Q. Had you completed the repairs by that time?

A. I think we were in the middle. We had not completed all of them.

Q. As a matter of fact you borrowed \$1500.00 from the F. H. A.?

A. We certainly did.

Mr. Houston: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Houston: Mr. Gilligan is willing to agree that the letter dated March 14, 1941, to Frederick Hundley and Mary G. Hundley was the first notice that came to Mr. Hundley raising any objection to the Hundleys owning this property.

I would like to recall Mrs. Bogikes.

Thereupon

Marian O. Bogikes

having heretofore been first duly sworn by the Clerk of the Court, was recalled, and assumed the witness stand, and, upon examination testified as follows:

Recross-examination

By Mr. Houston:

Q. You have been sworn, and I just wanted to inquire a little more about the purchase of your property, on the question of value, Mrs. Bogikes. You were shown the property by the Home Owners Loan Corporation and purchased the property from them?

A. Yes sir.

Q. Will you state what the Home Owners Loan Corporation was asking for the property?

The Court: You are speaking about 2534?

Mr. Houston: Yes sir.

Q. What was the price they asked?

A. They were asking \$9500.00.

Q. They reported to you they had an offer of \$10,000.00 from a Negro, and would not accept it?

A. Yes sir.

Q. You were able to purchase it for what?

A. \$8,000.00.

Q. You have been in the Gorewitz house?

A. Yes sir.

Q. And it is identical to yours?

A. Practically.

Q. Which has the larger rooms?

A. The same amount of rooms. The stairway is identical. We have two baths and they have one.

Q. What about the garage in the rear?

A. Ours is only a one car garage. Hers is a two car garage. It does not set right in the back yard as all the other garages set.

Q. Is that garage metal or what.

A. I don't know.

Q. So, you have the same number of rooms in your house and two baths and purchased your house for \$8,000.00?

A. Yes sir.

Mr. Houston: That is all.

Redirect Examination

By Mr. Crooks:

Q. Along that line, from whom did you get the title to your property?

A. From whom did we get the title?

Q. Yes. Who were your grantors, who did you buy from?

A. From the HOLC, and they said they searched the title, and we did not have to.

Q. Do you know how they got it, was it through a foreclosure?

A. Yes sir, it was; they foreclosed on the people that lived there. They were buying our house and the Hundley house and they foreclosed.

Q. The same people owned your house that owned the Hundley house?

A. Yes sir, and they foreclosed.

The Court: Was there a restrictive covenant in this?

Mr. Gilligan: Yes sir, the same restrictive covenant.

Mr. Crooks: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

Lauren Fleet

was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination, testified as follows:

Direct examination

By Mr. Houston:

Q. Mr. Fleet, you and your mother own the premises at 2526 Thirteenth Street?

A. Yes sir, we do?

Q. Do you intend to sell?

A. No sir.

Q. Do you intend to continue there?

A. Yes sir, regardless.

Mr. Houston: That is all.

Cross-examination

By Mr. Crooks:

Q. Regardless of what?

A. Regardless of anything that goes on, we intend to remain just the same.

Mr. Crooks: No further questions.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon

John A. Lankford

was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand, and, upon examination testified as follows:

Direct Examination

By Mr. Houston:

Q. Mr. Lankford, what is your full name?

A. John A. Lankford.

Q. You live where?

A. 1230 Girard Street, Northwest.

Q. Are you a licensed real estate broker?

A. Yes sir.

Q. And as such, with Mr. Holmes, you sold the property, 2530 Thirteenth Street to Mr. and Mrs. Hundley?

A. Yes sir.

Q. You received your fee from the seller, is that right?

A. Yes sir.

Q. Mrs. Hundley did not pay you at that time?

A. No sir.

Q. Now, Mr. Lankford, did you go back in the neighborhood to any place and discuss the sale of another house, or other houses, in this row of six?

A. Yes sir, I sold several houses in that neighborhood.

Q. No, just these six houses; did you go to Mrs. Gorewitz?

A. No, I went to the second door.

Q. Is that Mrs. Bogikes' house?

A. Yes sir.

Q. Did you talk to the lady who has just gone off of this stand?

A. Yes sir.

Q. What was the conversation?

A. I told her I was looking for a house for a party in that district, and I offered her \$1,000.00 more than she paid for her house. She said she did not mind selling to colored people, but not for \$1,000.00 more. If I would bring an offer of \$2,000.00 more she would be willing to sell.

Q. Did you advise the Hundleys that in your opinion the covenant was not any good?

A. Yes sir.

Mr. Houston: That is all.

Cross-examination

By Mr. Crooks:

Q. Were you familiar with the writing on the back of this contract.

A. I would have to see it.

Q. I show you this paper. On the back of it is written a statement dated January 17, 1941. Are you familiar with that statement?

A. Yes sir.

Q. You saw it written?

A. It was made quite a while after the original contract was signed. The sales contract was made quite a few days before this.

Q. The sales contract was dated January 11, is that correct as appears on the front of the contract.

A. Yes sir.

Q. And the other statement is dated January 17?

A. January 17, yes sir.

Q. You had a conversation with Mrs. Bogikes, did you not?

A. Yes sir.

Q. In regard to the sale of that house?

A. Yes sir.

Q. In that conversation isn't it a fact that you told her that if she would sell her home it would help the Hundleys.

A. No sir, I did not tell her anything like that.

Q. Did you make any statement to her regarding the Hundley's property?

A. No, unless I may have told her it was a good piece of property. I may have said something along that line.

Q. Which was the good piece of property, the Hundley property?

A. The Hundley property and her property also.

Q. Did you tell her the Hundley's were colored people?

A. No, that did not come up at all.

Q. Do you recall on what date you went to the Bogikes home and talked to her?

A. It was probably between the 10th and 15th of August. That is the last time. Do you mean the first time?

Q. Yes.

A. Probably it was along the last part of January or February along in there.

Q. 1941?

A. Yes sir, 1941.

Q. When you saw these people in August of this year, you knew of course, this suit had been filed, did you not?

A. Yes, I think so.

Q. Did you make any statement in regard to the suit.

A. No.

Q. You didn't say anything to Mrs. Bogikes about the suit?

A. I remember I did not say anything about the suit.

Q. Did you know at that time that she was a party plaintiff to this action?

A. No.

Mr. Crooks: That is all.

Mr. Houston: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Houston: I will call Dr. Frasier.

Thereupon

E. Franklin Frasier

was called as a witness for and on behalf of the defendants, and being then and there duly sworn by the Clerk of the Court, assumed the witness stand and, upon examination testified as follows:

Direct Examination

By Mr. Houston:

Q. Dr. Frasier, you are head of the Department of Sociology and Director of Social Work at the Howard University?

A. Yes sir.

Q. Will you state to the Court where you received your education in your special field?

The Court: May I ask counsel what the witness is going to testify to?

Mr. Houston: I expect to use this witness to testify to changes in the character of the neighborhoods and particularly this neighborhood, and the study he has made in connection with his work at the Howard University of the city of Washington. He is an author of a book, in fact several books one of them being "Negro Youth," and I want to show the cycle of real estate development, first from a home owners neighborhood to a rental neighborhood, and then it begins to break, and there is an infiltration of other groups, and then the real estate goes back again and goes through the same cycle, and we want to show that as far as Negroes, that the coming in of Negro home owners stabilizes the property, and increases the value of the property instead of depreciating it. In connection with the witnesses testimony I intend to introduce a study by the Federal Housing Administration pertaining to the growth of residential neighborhoods in American cities in 1939, and at pages 121 and 122 there is a discussion of this very phenomena.

The Court: I will exclude both the testimony of the witness and the author of the book.

Mr. Houston: Then may I make the specific offer. This testimony is offered to show that after the neighborhood has changed Negroes coming in have not worked the change but, the change was consummated before they came in, and we want to show the development of this particular neighborhood along the path of Thirteenth Street, which is an artery of the city, and we want to show that even though the covenant itself might be enforced by the Court, the enforcement would be futile. We want also to make offer of proof that the very persons who make the covenants are the persons who break the covenants. In other words, they get caught in an economic snare, and in order to get out, with falling values, that is a district going from a home owners district down to a tenant district, they break it. I want to offer the testimony of this witness, and show that the testimony of the witness would be predicated on the testimony introduced. Your Honor still adheres to your ruling?

The Court: Yes.

Mr. Houston: That will be all, Dr. Frasier.

(Thereupon the witness was excused and retired from the witness stand.)

Mr. Houston: Now I should like to call Dr. Raphael G. Urciolo. I want to tender Dr. Urciolo to prove that he was a teacher at the Central High School, and it was not true that the students were drawn from this particular neighborhood.

The Court: I think counsel has stated that himself. The question was asked specifically whether the pupils of the Central High School were from all over the city, or from this immediate neighborhood. Do I understand that this witness is going to testify different?

Mr. Houston: No, he is going to testify that they come from the city at large and not from the immediate neighborhood.

Now, I also want to qualify this witness as a real estate man experienced in the District of Columbia, and who has

intimate knowledge of these covenants to establish the fact that these covenants makers are the first ones to break the covenant.

The Court: The only question in this case is whether this particular covenant was binding. I do not think the witness would help.

Mr. Houston: Let me make my tender. I want to show after the covenant on S Street, and also on Columbia Road, in each instance in spite of the fact that the Court issued an injunction, the neighborhood again had a change, and I would like to have him testify, or tender his testimony to the effect that it has been shown that the covenant has depressed real estate values and the lifting of the covenant increased the value and I might refer specifically to Thirteenth Street. Is your Honor's ruling the same?

The Court: I will exclude the tender.

Mr. Houston: I do not think it is necessary to call him, but, I want to tender Dr. Emmett J. Scott who was one of the defendants in the S Street covenant who would testify if permitted that all of the houses in that block are now occupied by Negroes, which were subject to the covenant.

The Court: The ruling is the same with respect to this tender.

Mr. Gilligan: Shall we proceed now with the argument? I would be happy to have it go over until tomorrow morning.

The Court: If both counsel agree for it to go until tomorrow morning that is satisfactory.

I am anxious to finish this case tomorrow morning.

(Thereupon the instant hearing was concluded.)

STATUTES

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIII:

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

United States Code, title 8, Chapter 3. Civil Rights.

Section 41. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

U. S. CODE, TITLE 12, CHAPTER 12.—HOME OWNERS LOAN ACT OF 1933

§ 1461. Short Title

This chapter may be cited as the "Home Owners' Loan Act of 1933." (June 13, 1933, c. 64, § 1, 48 Stat. 128.)

§ 1462. Definitions

As used in this chapter—

(a) The term "Board" means the Federal Home Loan Bank Board created under chapter 11 of this title.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 1463 of this chapter.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed \$20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

(d) The term "association" means a Federal Savings and Loan Association chartered by the Board as provided in section 1464 of this chapter. (June 13, 1933, c. 64, § 2, 48 Stat. 128; June 27, 1934, c. 847, § 508 (a), 48 Stat. 1264; May 28, 1935, c. 150, § 10, 49 Stat. 296.)

§ 1463. Home owners' loan corporation

(a) **Creation; directors.** The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of

the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the Board of Directors of the Corporation and shall serve as such directors without additional compensation.

(b) Capital stock; subscription by United States; allocation of funds by Reconstruction Finance Corporation. The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate \$200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscriptions shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of \$200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 609 of Title 15, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) Bond issue by corporation authorized; interest and principal guaranteed by United States; exemption from taxation. In order to provide for applications filed before May 28, 1935, for applications filed within thirty days thereafter, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate

amount not to exceed \$4,750,000,000, which may be exchanged as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided*, That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corpo-

ration issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under sections 752, 753 and 757 of Title 31, and the purposes for which securities may be issued under such sections are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Secretary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commit-

ments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bond of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on April 27, 1934.

(d) Exchange of bonds for mortgages; amortization of mortgages; interest rates. The Corporation is authorized, for a period of three years after June 13, 1933, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to June 13, 1933, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding \$50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case \$14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value

of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owners owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed twenty-five years; but the amortization payments of any home owner may be made quarterly, semiannually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation or may at any time during the existence of the mortgage grant an extension and revision of its terms to provide for the amortization by means of monthly payment sufficient to retire the interest and principal within a period not to exceed twenty-five years from the date of its execution if in the judgment of the Corporation the circumstances of the home owner and the condition of the security justify such extension or revision. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling for not more than four families used by the owner as a home or held by him as a homestead and having a value not exceeding \$20,000. No discrimination

shall be made under this chapter against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purpose of this chapter, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property. (As amended Aug. 11, 1939, c. 684, 53 Stat. 1403.)

(e) Cash loans on unincumbered property; interest. The Corporation is further authorized, for a period of three years from June 13, 1933, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) Cash loans on mortgaged property; interest. The Corporation is further authorized, for a period of three years from June 13, 1933, in any case in which the holder of a home mortgage or other obligation or lien eligible for ex-

change under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) Loans to redeem foreclosed property. The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) Appraisal rules. The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this chapter: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) Payment of loans in bonds of Corporation. Any person indebted to the Corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) Officers and employees; compensation; free use of mails. The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this chapter, without regard to the

provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this chapter and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a bona fide resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) By-laws, rules and regulations; cancellation of bonds; liquidation of Corporation; dividends. The Board is authorized to make such bylaws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be

applied to the retirement of the bonds of the Corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(l) When mortgagor must be in default. No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebtedness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided*, That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) Advances for rehabilitation, modernization, etc., of homes. In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilitation, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take a new home mortgage for the whole indebtedness; but the total amount advanced shall

in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed \$400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) Purchase of obligations of other banks and associations. The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided*, That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under sections 1724 to 1730 of this title, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation \$300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection. (June 13, 1933, c. 64, § 4, 48 Stat. 129;

Apr. 27, 1934, c. 168, §§ 1 (a), 2, 3, 4, 13, 48 Stat. 643, 644, 645, 647; June 27, 1934, c. 847, §§ 506 (a), (b), 508 (b), 48 Stat. 1263, 1264; May 28, 1935, c. 150, §§ 10-16, 17 (a), 49 Stat. 296-297.)

§ 1463a. Bonds issued under original provisions; interest and principal.

The amendments made by the Act of April 27, 1934, to subsection (c) of section 1463 of this title (except with respect to refunding) shall not apply to any bonds prior to April 27, 1934, issued by the Home Owners Loan Corporation under such subsection (c) of section 1463, or to any bonds thereafter issued in compliance with commitments of the Corporation outstanding on April 27, 1934. (Apr. 27, 1934, c. 168, § 1 (b), 48 Stat. 644.)

ADDENDUM

U. S. Code, title 8, sec. 42. Property rights of citizens.

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

BRIEF AND APPENDIX FOR APPELLEES

IN THE
United States Court of Appeals
for the District of Columbia

No. 8154

FREDERICK F. HUNDLEY AND MARY G. HUNDLEY,
Appellants

v.

REBECCA GOREWITZ, PAUL W. BOGIKES AND MARION O.
BOGIKES,
Appellees

Appeal from the District Court of the United States for
the District of Columbia.

BRIEF FOR APPELLEES

HENRY GILLIGAN,
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IN THE
**United States Court of Appeals
for the District of Columbia**

No. 8154

FREDERICK F. HUNDLEY AND MARY G. HUNDLEY,
Appellants

v.

REBECCA GOREWITZ, PAUL W. BOGIKES AND MARION O.
BOGIKES,
Appellees

Appeal from the District Court of the United States for
the District of Columbia.

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

Appellees deem it necessary to make a brief and concise statement of the case. Appellees were plaintiffs below and appellants were defendants below; their designations below will be here used.

This is an appeal from a judgment of the District Court of the United States for the District of Columbia whereby the defendants Hundley were "permanently enjoined from ever owning, occupying, selling, leasing, transferring or

conveying the land known as Lot 821 in Square 2866, and the improvements thereon"; requiring the Hundleys to remove from the premises within 120 days; and declaring the deed from defendant Holmes to the Hundleys null and void. (Appellants' Appendix 19, 20).

The plaintiff Gorewitz is the owner and occupant, with her family, of Lot 822, Square 2866, premises 2528 13th Street, N. W. and plaintiffs Bogikes are the owners, as tenants by the entirety, and occupants of Lot 75, Square 2866, premises 2534 13th Street, N. W. The defendants Hundley are the owners and occupants of Lot 821, Square 2866, premises 2530 13th Street, N. W. Plaintiffs are white persons and defendants Hundley are negroes or colored persons. (Appellants' App. 13, 14). The properties of plaintiffs and defendants were acquired by them through mesne conveyances from Harry B. Willson and Harry Wardman, as joint tenants, and are located on the West side of the 2500 Block of 13th Street, N. W., between Clifton and Euclid Streets. (Appellants' App. 14). These properties, as well as Lots 820 (76), 823 (79), and 824 (80), Square 2866, constituting a row of six substantial dwellings, were built and sold by Willson and Wardman in 1910 and are known as "Harry B. Willson's subdivision of lots in Block numbered Thirty (30), 'Columbia Heights' ". (Appellants' App. 14).

In all of the deeds from Willson and Wardman to their several grantees, during the year 1910, with the exception of the deed to Lot 823 (79), the following covenant appears:

"Subject also to the covenants that said lot shall never be rented, leased, sold, transferred or conveyed unto any Negro or colored person under a penalty of Two Thousand Dollars (\$2,000.00), which shall be a lien against said property." (Appellants' App. 10).

Said Lot 823 (79) was the first lot sold out of the six, and is located immediately South of and adjacent to the lot of plaintiff Gorewitz. This property has been occupied by one Fleet, a negro. (Appellants' App. 14).

The balance of the property in the 2500 Block of 13th Street, N. W., which includes also two large apartment houses, was owned and occupied by white people. (Appellants' App. 15, 18). The plat of the surrounding neighborhood which was incorporated in the Court's findings shows the condition as to white and colored occupancy (Appellees' App. 1). The Court found that the immediate neighborhood was white. (Appellants' App. 18).

The Home Owners' Loan Corporation, in 1934, made a loan to the then owner of Lot 821, Square 2866, secured by a deed of trust on the property. Upon default, the Home Owners' Loan Corporation foreclosed under its Trust and the trustees sold the property at public auction on November 12, 1940. The Home Owners' Loan Corporation bought in the property at said sale and the trustees, by deed dated November 13, 1940, conveyed title to said Corporation. By deed dated December 23, 1940 and recorded January 13, 1941, the Home Owners' Loan Corporation conveyed the property to Nelson D. Holmes, and by deed dated January 17, 1941, recorded January 23, 1941, said Holmes conveyed the property to defendants Hundley. In this latter deed the language "subject to the covenants of record" appeared. (Appellants' App. 72, 73).

The evidence showed, and the Court found, that the defendants Hundley took title with knowledge of the covenant and also agreed to hold harmless their grantor, Holmes, from any action which might result from such sale by reason of the covenant. The agreement was in evidence. (Appellants' App. 46).

From the judgment declaring the covenant enforceable, cancelling the deed from Holmes to the Hundleys, and requiring the Hundleys to vacate, defendants Hundley appeal. (Appellants' App. 19). Defendant Holmes did not appeal.

SUMMARY OF THE ARGUMENT

I. The covenant is valid and enforceable.

a. The covenant is designed to protect the properties to which it applies and is enforceable upon breach against persons taking with notice.

b. The covenant does not constitute an unlawful restraint on alienation.

c. The covenant is not in violation of the Constitution or against public policy.

II. Validity and enforceability of covenant are not affected by title having been derived through mesne conveyances from the Home Owners' Loan Corporation.

ARGUMENT

I. The covenant is valid and enforceable.

a. The covenant is designed to protect the properties to which it applies and is enforceable upon breach against persons taking with notice.

The record here shows that Willson and Wardman, in 1910, erected a row of six dwellings on six contiguous lots on the west side of the 2500 Block of 13th Street, N. W. In the deeds to five of the six properties, as they were sold and conveyed, the builders made the properties subject to the restrictive covenant. The first lot was sold in July, 1910 without the covenant. The other five properties were sold and conveyed during September, 1910, and the deeds to each contained the identical covenant. (Appellants' App. 10).

The plaintiffs, as well as the defendant Holmes, and their predecessors in title, by acquiring their respective properties submitted to a burden on their land in the form of a restrictive covenant. Plaintiffs relied on the covenant re-

strictions when they purchased the property. (Appellants' App. 24, 39, 40). Holmes knew of the existence of the covenant, as did the Hundleys. (Appellants' App. 45, 46).

Restrictive covenants of the kind here in question have been upheld and enforced consistently in the District of Columbia,

Torrey v. Wolfes, 56 App. D. C. 4, 6 F. 2d 702

Cornish v. O'Donoghue, 58 App. D. C. 359, 30 F. 2d 983

and an attempt to remove a covenant identical with the one here involved was not permitted by this Court.

Grady v. Garland, 67 App. D. C. 73, 89 F. 2d 817

Appellants state in their brief that this Court has never examined "critically" the questions raised in this appeal. An examination of the briefs in *Torrey v. Wolfes*, *supra*, and *Cornish v. O'Donoghue*, *supra*, indicates that the issues raised herein were argued and examined in those cases.

Covenants restricting the use and ownership of property by negroes are enforceable as to the properties to which they apply without regard to changes in surrounding territory.

Grady v. Garland, *supra*

The purpose of such covenants is to protect the owners who purchase relying on them and subject themselves to them. Obviously, a builder cannot undertake to control adjacent property not owned by him, nor can his successors in title control the surrounding territory which is not subject to like restrictions. But, where the property descends from a common source subject to uniform restrictions, parties in privity can enforce the restrictions. If this were otherwise all that would be necessary to defeat the covenant would be the moving in of a few negroes in the immediate neighborhood. The enforceability of contractual rights would be

utterly defeated under such circumstances, and the owners of property in the covenanted area would be required to stand idly by while real estate speculators jockey in a negro family or two. This is exactly what appellants' argument urges on a court of equity. They would use the occupancy of 2526 13th Street, N. W., the house not subject to the covenant, as a wedge to void the covenant on the restricted houses. This emphasizes appellees' position that where properties are subject to covenants it is the duty of the owners to enforce them; where there are no restrictions there is no legal or equitable right to enforce anything. If appellees had failed to seek their remedy of injunction immediately upon learning of the Hundley sale and occupancy the defense of laches would have been pressed, but, it is contended by appellants, by appellees acting promptly they are without any rights because a house over which they have no control and which is not subject to the covenant became occupied by negroes. This seems to be the only basis for appellants' argument, for insofar as change of neighborhood is concerned, the evidence and the plat (Appellees' App. 1) show conclusively that the entire immediate neighborhood has been preserved as a residential section for persons of the white race.

Even if the argument is based on the theory of general neighborhood plan or scheme, the fact that the original grantor conveyed some lots without the covenant has been held not ground for the refusal of a court of equity to enforce the covenant.

Hano v. Bigelow, 155 Mass. 341, 29 N. E. 628

Leader v. Laflamme, 111 Me. 242, 88 A. 859

Bacon v. Sandberg, 179 Mass. 396, 60 N. E. 936

Velie v. Richardson, 126 Minn. 334, 148 N. W. 286

b. The covenant does not constitute an unlawful restraint on alienation.

Contrary to appellants' statement that this question has never been "critically" examined by our Courts, an ex-

amination of the briefs in the cases of *Cornish v. O'Donoghue*, *supra*, and *Torrey v. Wolfes*, *supra*, as well as those in the case of *Corrigan v. Buckley*, 55 App. D. C. 30, 299 F. 899, affirmed 271 U. S. 323, 70 L. ed. 969, indicates complete presentation of the point.

This question was settled in *Cowell v. Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547, involving the validity of a covenant to the effect that intoxicating liquors should never be sold on the premises. Mr. Justice Field, delivering the unanimous opinion of the Court, and in answer to the contention that the condition was repugnant to the estate granted, says:

“But the answer is that the owner of property has a right to dispose of it with a limited restriction on its use, however much the restriction may affect the value or the nature of the estate. Repugnant conditions are those which tend to the utter subversion of the estate, such as prohibit entirely the alienation or use of the property. Conditions which prohibit its alienation to particular persons or for a limited period, or its subjection to particular uses, are not subversive of the estate; they do not destroy or limit its alienable or inheritable character.”

In *Torrey v. Wolfes*, *supra*, this Court, in upholding the validity of a covenant identical with the one now under consideration, held that any citizen whether he be white or colored, has the right to sell his property “under such lawful restrictions as he may see fit to impose”. And the case of *Corrigan v. Buckley*, *supra*, was held controlling.

The true test of whether restrictions or conditions are void as a restraint on alienation is whether the restriction imposed restrains *all* alienation. There is a clear distinction between restrictions against *all* alienation and restrictions against alienation to *particular persons* or for *particular purposes*. Clearly, the covenant restrictions in the present case do not forbid *all* alienation; but, rather, the owner is free to sell his property at any and all times to

any and all persons, except those of the excluded race. He is free to transfer a complete fee simple estate subject, however, to a restriction in the nature of an easement or incorporeal hereditament. (*Castleman v. Avignone*, 56 App. D. C. 253, 12 F. 2d 326.)

In the cases cited by appellants on this point the courts' conclusions are not supported by their reasoning and cases cited. In *Porter v. Barrett* (233 Mich. 373, 206 N. W. 532) the Court relied entirely on cases holding devises in fee subject to conditions to be void. The Court relies on *Mandlebaum v. McDonell* (29 Mich. 78, 18 Am. Rep. 61), which held "that a condition or restrictions which would suspend all power of alienation for a single day is inconsistent with the estate granted, unreasonable, and void". In *White v. White* (108 W. Va. 128, 150 S. E. 531), cited by appellants, the Court, after reviewing a number of cases involving devises, quoted from the *Mandlebaum* and *Porter* cases as the leading cases on the point. While the *White* Case reaches the conclusion that the covenant is an unlawful restraint on alienation as being repugnant to a fee simple estate, the reasoning of the Court is based on the proposition that general restraints on alienation, or restraints on *all* alienation, are void. The covenant in the present case does not restrain *all* alienation, nor is there any general restraint imposed.

Appellants seem to admit that restraints on use are valid, but contend that restraints on ownership are not. They argue that negroes cannot acquire homes in which to live, and that because of restrictions negroes must live in "traditionally Negro settled areas". This is inconsistent. Do the negroes wish to acquire property without the right of use? If that is so, the negro investor must rent to white tenants; this will not make for more negro housing and the property will not increase in value. As a matter of fact, there is no point to their argument if negroes cannot occupy the property, for as a whole they constitute the lower income group not interested in investment property. The facts in

this case show an attempt by negroes to move into a white neighborhood where values are high and the property in good repair.

Restrictions on use have been uniformly declared valid throughout the country. The hair-splitting reasoning advanced by appellants, and used in the state cases cited by them, as to restraints on alienation has not been employed in this District. This point has been reviewed by this Court on previous occasions and it has been held consistently that the restrictive covenant here involved does not constitute an undue restraint on alienation.

c. The covenant is not in violation of the Constitution or against public policy.

This Court and the Supreme Court of the United States have clearly stated that restrictive covenants excluding negroes from use and ownership of real property do not violate the Constitution of the United States.

Corrigan v. Buckley, supra.
Torrey v. Wolfes, supra.

On the question of public policy, this Court, in *Grady v. Garland, supra*, stated:

“These covenants constitute valid and solemn contracts and should not be lightly set aside. We think that existing local conditions, the growth and expansion of the National Capital, and its constant tendency to changes in the use and occupancy of property, require the holding that valid restrictive covenants are intended primarily to protect the property included in the restricted area, and should not be set at naught merely because of conditions affecting the surrounding territory.”

In *Corrigan v. Buckley, supra*, this Court said, at page 32 of 55 App. D. C.:

“It follows that the segregation of the races whether by statute or private agreement, where the method adopted does not amount to the denial of fundamental constitutional rights, cannot be held to be against public policy. Nor can the social equality of the races be attained, either by legislation or by the forceable assertion of assumed rights. * * * ”

II. Validity and enforceability of covenant are not affected by title having been derived through mesne conveyances from Home Owners' Loan Corporation.

Apparently the position taken by appellants is that because the H. O. L. C. is “an instrumentality of the United States” the corporation ipso facto is the sovereign Government of the United States; hence any property acquired by the corporation is freed of restrictions because the Government is prohibited by the Constitution from discriminating.

While it is indisputable that the act creating the Home Owners' Loan Corporation denominates it as “an instrumentality of the United States”, the issue here involved is simply whether the fact that the corporation took title by trustees' deed, following foreclosure under a deed of trust, vitiates the covenant.

The Home Owners' Loan Corporation was created by Congress to aid homeowners in a time of national depression by lending money for the purpose of refinancing their homes. It was authorized on a scale far greater than any private enterprise could undertake. The corporation was, nevertheless, entering the field of private enterprise, competing with building and loan associations, banks, finance companies and private lending organizations. And with respect to ownership and management of separate pieces of real estate the acts and duties of the corporation involved no function of sovereign government.

Herman v. H. O. L. C., 120 N. J. L. 437, 200 A. 742
Pennell v. H. O. L. C., (D. C. Maine) 21 F. Supp. 497
Gillen v. H. O. L. C., 8 N. Y. S. 2d 945

It is a well established principle in both the Federal and the State courts that when Government enters private business it abandons its sovereignty and is to be treated as any private corporation, and the mere fact that a corporation is an instrumentality of the Government does not defeat the doctrine of separate entities.

Bank of U. S. v. Planters Bank of Georgia, 9 Wheat. 904, 6 L. ed. 244

Salas v. U. S., (2d Circuit) 234 F. 842

South Carolina v. U. S., 199 U. S. 437, 50 L. ed. 261

U. S. v. Strang, 254 U. S. 491, 65 L. ed. 368

Central Market v King, 132 Neb. 380, 272 N. W. 244, certiorari denied in 302 U. S. 687, 82 L. ed. 531

Gill v. Reese, 53 Ohio App. 134, 4 N. E. 2d 273

A learned discussion of the history of the creation and function of public corporations is found in

Keifer & Keifer v. R. F. C., 306 U. S. 381, 83 L. ed. 784

It has been held that the H. O. L. C., with respect to matters concerning mortgages, has all the attributes of a private corporation.

H. O. L. C. v. Barone, 298 N. Y. S. 531

McAllister v. Drapeau, . . . Cal. App. 2d . . . , 85 P. 2d 523

In the case at Bar the real purpose for which the corporation was created had been accomplished when the loan was made to the then owner. Thereafter, as an incident only of any lender's right to execute on his security, the H. O. L. C. instructed the trustees under the Trust to foreclose, an auction sale was had, and the Corporation bought in the property, as would any private corporation or individual in a like situation. Later, the property was purchased by and conveyed to Holmes, a white man, who sold and conveyed to negroes, subject to covenants of record.

The question is: Were these acts of the Corporation in

fact acts of a sovereign? Appellees submit that the answer is clearly in the negative.

Equally false is appellants' contention that purchasers at tax sales are in a position similar to the purchaser in the case at Bar. It is the sovereign right of Government, be it Federal or State, to collect taxes to defray the expenses of government. When, to collect taxes due, the taxing power sells property and gives a tax deed it is the Government acting in its normal, sovereign right. The character of title taken by a purchaser at a tax sale is not involved in this case. The Congress, by authorizing the creation of a corporation for a limited time primarily to lend money to save home owners, did not create an agency to administer the usual and ordinary acts of sovereignty.

The sovereign is not subject to taxation. Real property of the H. O. L. C. is subject to taxation to the same extent as other real estate is taxed.

Home Owners' Loan Act, U. S. Code, T. 12, ch. 12, sec. 1463(c)

The Corporation is not authorized to acquire real estate except in connection with defaults in payments of loans.

There is nothing in the Act or in the theory of public corporations which sustains appellants' contention that upon foreclosure the single piece of real estate on 13th Street became "part of the public assets of the United States". The method of financing the Corporation required the Secretary of the Treasury to purchase the capital stock, and the United States became the owner thereof; bonds of the Corporation were to be sold to private persons. Isolated parcels of real estate acquired by the Corporation in connection with its business can in no wise be considered owned by the United States.

It is submitted that the restrictive covenant is in full force and effect and the ownership of the property by the H. O. L. C. had no effect on the validity of the covenant.

CONCLUSION

Plaintiffs have come into a Court of Equity with clean hands seeking enforcement of the covenant based on the well established law of this jurisdiction. Defendants are seeking to have sustained a deliberate breach of the covenant for which they alone are responsible. The court below gave the injunctive relief to which the plaintiffs are entitled.

It is respectfully submitted that the judgment of the lower court should be affirmed.

HENRY GILLIGAN,

JAMES A. CROOKS,

Attorneys for Appellees

APPENDIX

PLAT APPENDED TO
FINDINGS OF FACT AND CONCLUSIONS
OF LAW. (TYPEWRITTEN RECORD, P. 124.)

 - indicates negro ownership or occupancy between 11th & 14th Streets, N.W. and Florida Ave. & Park Road. Unshaded areas white.

